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Federal Communications Commission Record

Volume 4
Issue 17

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... v

Table of Rulemaking Numbers..... vi

Table of Localities..... vii

Table by Subject Matter..... viii

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 6251

Federal Communications Commission Record

Table of Cases
Volume 4
Issue 17

Case Name	Page
AT&T Communications	6484
AT&T Communications	6289
AT&T Communications	6268
Abuses of Commission Processes by Broadcast Applicants	6342
Abuses of Commission Processes by Broadcast Applicants	6498
Advisory Committee on Advanced Television Service	6531
Amendment of Part 2 - Allocation of 216-225 MHz Band	6407
Amendment of Part 32 - SFAS No. 96, Accounting for Income Taxes	6447
Amendment of Part 73 - FM Broadcast Stations, Class A Power	6375
Amendment of Part 74 - Satellite/Terrestrial Microwave	6459
Amendment of Part 97 - Amateur 17 Meter Band	6343
Amendment of Parts 2 and 15 - Spread Spectrum Systems	6370
Amendment of Parts 73 and 76 - Syndex	6476
Ameritech Operating Companies	6497
Ameritech Operating Companies	6266
Bay Springs Telephone Company, Inc.	6278
Beasley Radio Company	6344
Broadcast Multiple Ownership Rules	6489
CC Docket No. 80-286, Letters Submitted	6542
Catoctin Broadcasting Corp. of New York	6312
Chester Associates	6488
Childress Radio Company	6512
Columbia Cellular Partnership	6432
Communications Satellite Corporation	6499
Compulsory Copyright License for Cable Retransmission	6562
Continental Satellite Corporation	6292
Correction of Part 74 - Frequency Assignment Rules (ERRATUM)	6320
Depreciation Rate Prescriptions	6263
Flexible Allocation of Frequencies in the DPLMS	6415
Frequency Coordination in Private Radio Services	6325
GE American Communications, Inc.	6351
GE American Communications, Inc.	6534
GTE Spacenet Corporation	6524
Garcia, Armando	6487
Georgia Public Telecommunications Commission	6357
Glinter, Michael B.	6506
Good News Broadcasting	6251
Great American Television and Radio Co., Inc.	6347
Hearth, Pierce Kennedy	6482
Hilgendorf, Donald E.	6392
Independent Data Communications Manufacturers Association, Inc.	6537
MCI International, Inc.	6526

Case Name	Page
MTS and WATS Market Structure	6527
Mad River Broadcasting Company	6456
Midyear 1986 Access Tariff Filings	6291
Mountain States Telephone and Telegraph Company	6486
NYCOM Information Services, Inc.	6525
New England Telephone and Telegraph Company, Inc.	6434
New York Telephone Company	6496
Northland Broadcasters, A Limited Partnership	6508
Pascal, Charles P.	6428
Perry, Mark A.	6500
Potential Uses of Certain DBS Orbital Locations	6306
Poughkeepsie Broadcasting Limited Partnership	6543
RKO General (KHJ-TV)	6446
Rayne Broadcasting Company, Inc.	6552
Recreational Marine Association, Inc.	6287
Renewal Expectancy	6363
Richmond Hill Broadcasting	6353
Satellite Coordination Seminar	6481
Schultz, Pepper	6393
Separate Statement of Commr. Dennis - One-to-a-Market Rule	6532
Separate Statement of Commr. Dennis - Program Exclusivity	6533
Shared Network Facilities Agreements	6483
Sun Communications, Inc.	6429
TPI Transmission Services, Inc.	6479
Table of Allotments, FM, Albert Lea, MN	6321
Table of Allotments, FM, Beulah, MI	6469
Table of Allotments, FM, Chippewa Falls, WI	6323
Table of Allotments, FM, Fort Valley and Wrightsville, GA	6467
Table of Allotments, FM, Hot Springs Village, AR	6541
Table of Allotments, FM, Klondike, SC	6520
Table of Allotments, FM, Knoxville, IA	6516
Table of Allotments, FM, Kremmling and Widefield, CO	6474
Table of Allotments, FM, Monroeville and Thomasville, AL	6471
Table of Allotments, FM, Ottumwa, IA	6518
Table of Allotments, FM, Plantersville, SC	6514
Table of Allotments, FM, Ringgold, GA	6522
Table of Allotments, FM, Scottsboro, AL and Trenton, GA	6473
Table of Allotments, FM, Statesboro, GA	6339
Table of Allotments, FM, Trinity and Rogersville, AL	6523
Table of Allotments, TV, Yreka City, CA and Medford, OR	6340
The Baltimore Radio Show, Inc.	6437
Treatment of Ex Parte Contacts	6256
Trinchitella, Ronald F.	6360
Tucson Community Broadcasting, Inc.	6316
US Sprint Communications Company Limited Partnership	6279
Western Union Corporation	6485
Zozaya, Julia S.	6271

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 4
Issue 17

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 89 - 788	6484	DA 89 - 969	6516
DA 89 - 829	6256	DA 89 - 970	6520
DA 89 - 881	6251	DA 89 - 971	6541
DA 89 - 883	6357	DA 89 - 972	6522
DA 89 - 884	6353	DA 89 - 974	6263
DA 89 - 914	6485	DA 89 - 975	6524
DA 89 - 929	6512	DA 89 - 976	6525
DA 89 - 930	6506	DA 89 - 977	6526
DA 89 - 931	6508	DA 89 - 978	6542
DA 89 - 934	6486	DA 89 - 979	6523
DA 89 - 936	6289	DA 89 - 981	6266
DA 89 - 937	6291	DA 89 - 983	6268
DA 89 - 938	6320	DA 89 - 988	6532
DA 89 - 940	6279	DA 89 - 989	6533
DA 89 - 941	6278	FCC 88 - 340	6562
DA 89 - 942	6482	FCC 89 - 109	6363
DA 89 - 944	6339	FCC 89 - 206	6407
DA 89 - 945	6340	FCC 89 - 221	6498
DA 89 - 946	6287	FCC 89 - 232	6375
DA 89 - 947	6531	FCC 89 - 234	6415
DA 89 - 948	6321	FCC 89 - 246	6479
DA 89 - 949	6323	FCC 89 - 249	6537
DA 89 - 950	6351	FCC 89 - 250	6534
DA 89 - 951	6467	FCC 89 - 252	6312
DA 89 - 952	6469	FCC 89 - 253	6316
DA 89 - 953	6471	FCC 89 - 254	6370
DA 89 - 954	6473	FCC 89 - 255	6325
DA 89 - 955	6474	FCC 89 - 256	6489
DA 89 - 956	6429	FCC 89 - 257	6292
DA 89 - 957	6432	FCC 89 - 258	6306
DA 89 - 958	6434	FCC 89 - 259	6446
DA 89 - 959	6496	FCC 89 - 260	6527
DA 89 - 960	6497	FCC 89 - 262	6342
DA 89 - 962	6499	FCC 89 - 263	6347
DA 89 - 964	6483	FCC 89 - 265	6428
DA 89 - 965	6481	FCC 89 - 266	6343
DA 89 - 967	6514	FCC 89 - 267	6344
DA 89 - 968	6518	FCC 89 - 270	6360

Delegated Authority or FCC Number	Page
FCC 89 - 271	6447
FCC 89 - 274	6476
FCC 89 - 275	6456
FCC 89 - 276	6459
FCC 89D - 33	6271
FCC 89D - 34	6552
FCC 89D - 35	6543
FCC 89I - 50	6488
FCC 89I - 51	6487
FCC 89R - 46	6500
FCC 89R - 51	6437
FCC 89R - 52	6392
FCC 89R - 53	6393

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 4
Issue 17

Docket Number		Page
BC	Dkt.No.79 - 58	6316
BC	Dkt.No.81 - 742	6363
CC	Dkt.No.78 - 72	6527
CC	Dkt.No.80 - 286	6542
CC	Dkt.No.86 - 79	6537
CC	Dkt.No.87 - 120	6415
CC	Dkt.No.88 - 95	6499
CC	Dkt.No.88 - 136	6266
CC	Dkt.No.89 - 360	6447
GEN	Dkt.No.87 - 14	6407
GEN	Dkt.No.87 - 24	6476
GEN	Dkt.No.87 - 25	6562
MM	Dkt.No.83 - 1206	6393
MM	Dkt.No.84 - 525	6488
MM	Dkt.No.85 - 92	6312
MM	Dkt.No.86 - 35	6523
MM	Dkt.No.86 - 112	6459
MM	Dkt.No.87 - 7	6489
MM	Dkt.No.87 - 65	6437
MM	Dkt.No.87 - 306	6321
MM	Dkt.No.87 - 310	6323
MM	Dkt.No.87 - 560	6552
MM	Dkt.No.87 - 591	6473
MM	Dkt.No.88 - 17	6392
MM	Dkt.No.88 - 178	6474
MM	Dkt.No.88 - 218	6339
MM	Dkt.No.88 - 221	6467
MM	Dkt.No.88 - 275	6271
MM	Dkt.No.88 - 279	6543
MM	Dkt.No.88 - 354	6500
MM	Dkt.No.88 - 374	6498
MM	Dkt.No.88 - 375	6375
MM	Dkt.No.88 - 413	6522
MM	Dkt.No.88 - 518	6340
MM	Dkt.No.88 - 603	6541
MM	Dkt.No.89 - 337	6357
MM	Dkt.No.89 - 352	6251
MM	Dkt.No.89 - 353	6353
MM	Dkt.No.89 - 355	6306
MM	Dkt.No.89 - 356	6506
MM	Dkt.No.89 - 357	6512
MM	Dkt.No.89 - 358	6342
MM	Dkt.No.89 - 359	6508
MM	Dkt.No.89 - 361	6469
MM	Dkt.No.89 - 362	6471
MM	Dkt.No.89 - 364	6514
MM	Dkt.No.89 - 365	6518
MM	Dkt.No.89 - 366	6516
MM	Dkt.No.89 - 367	6520
PR	Dkt.No.88 - 467	6343
PR	Dkt.No.88 - 548	6325

Table of Cases by Rulemaking Number
Volume 4
Issue 17

Rulemaking Number	Page
RM - 5134	6523
RM - 5377	6523
RM - 5837	6321
RM - 5845	6473
RM - 5851	6323
RM - 5935	6473
RM - 5992	6473
RM - 6118	6474
RM - 6121	6323
RM - 6123	6340
RM - 6177	6467
RM - 6232	6339
RM - 6236	6375
RM - 6237	6375
RM - 6370	6522
RM - 6439	6474
RM - 6455	6541
RM - 6694	6471
RM - 6718	6469
RM - 6796	6514
RM - 6811	6518
RM - 6824	6516
RM - 6835	6520

Table of Cases by City
Volume 4
Issue 17

City/State	Page	City/State	Page
Albert Lea, MN	6321	Ottumwa, IA	6518
Anchorage, AL	6508	Plantersville, SC	6514
Arcata, CA	6456	Poughkeepsie, NY	6543
Beulah, MI	6469	Rayne, LA	6552
Brookfield, WI	6392	Red Wing, WI	6323
Casper, WY	6360	Richmond Hill, GA	6353
Chippewa Falls, WI	6323	Ringgold, GA	6522
Cleveland, OH	6344	Rogersville, AL	6523
Crossville, TN	6500	Roswell, GA	6357
East Hampton, NY	6488	Scottsboro, AL	6473
Flagstaff, AZ	6271	Signal Mountain, TN	6473
Fort Valley, GA	6467	Smyrna, DE	6437
Fredonia, NY	6312	Sparks, NV	6393
Greensboro, NC	6512	Statesboro, GA	6339
Guadalupe, CA	6487	Thomasville, AL	6471
Hot Springs Village, AR	6541	Trenton, GA	6473
Klondike, SC	6520	Trinity, AL	6523
Knoxville, IA	6516	Tucson, AZ	6316
Kremmling, CO	6474	Wichita Falls, TX	6251
Los Angeles, CA	6446	Widefield, CO	6474
Medford, OR	6340	Winston-Salem, NC	6506
Monroeville, AL	6471	Wrightsville, GA	6467
		Yreka City, CA	6340

Subject	Page
Adjudication	
Air hazard	6552
Civic participation	6552
Extraordinary special relief	6312
Administrative Law Judge Decision	
Failure to prosecute	6500
Financial qualifications	6393
Integration of ownership into management, quantitative aspect	6437, 6437
Misrepresentation and lack of candor	6437, 6316
Reopening of record	6316
Satellite operation	6437
Site availability or suitability	6316
Staffing issue	6393
Orders or Notices	
Programming, specialized	6271
Reconsideration, timeliness and	6312
Review Board or Commission Decision	
Diversification of control of mass media	6543
Integration of ownership into management, quantitative	6543
Reopening of record	6552
Broadcast Radio Services - General Rules	
Applications	
Facilities must specify only 1 frequency/channel assignment	6446
Facilities, applications to modify/change control of unbuilt	6488
Applications for authorization	
Amendment of applications	6316
Conflicts in applications, agreement for removing	6446, 6487
Licenses and permits	
Multiple ownership of broadcast stations in the same service	6347, 6456,
Operation of station	
Transmission system, modification of	6375
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	6323, 6321, 6469, 6471, 6514, 6518, 6541, 6522
Distances between stations, minimum	6375, 6344
Technical requirements	
Antenna height and power requirements	6375, 6344

Subject	Page
Antenna systems	6344
Stations at spacings below minimum separation	6375
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	6340
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	6279, 6525
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	6497
General public information and inspection of records	
Records not routinely available for public inspection	6428
Common Carriers/Affiliates: Reports	
Depreciation rates, reports of proposed changes in	6263
Common Carriers: Miscellaneous Rules	
Enhanced services (computer) and customer-premises equipment	6537
Communications Act of 1934	
Common Carriers	
Accounts, records, memoranda,forms of; depreciation charges	6263
Discrimination and preferences	6479, 6527
Extension of lines, certificate for	6279, 6351,
Service and charges	6479, 6527
Procedural and Administrative provisions	
Inquiry by Commission on its own motion	6342, 6498
Orders of Commission, proceedings to enjoin/set aside/annul/suspe	6446
Witnesses and depositions, provisions relating to proceedings-	6342
Radio, provisions relating to	
Applications, special requirements with respect to	6446
Applications;form of and conditions attached to licenses	6524, 6526
Construction permits	6524
Scope of the act	
Applications of the act	6479
Direct Broadcast Satellite Service (DBS)	
General information	
Definitions	6306
Licenses	
Application requirements	6292

Subject	Page
Authorization conditions	6292, 6306
Operating requirements	
Equal employment opportunities	6292
Technical requirements	
Specifications may be different from Final Acts, values for	6292, 6306
Frequency Allocations and Radio Treaty Matters	
Allocation, assignment, and use of radio frequencies	
International and U.S. table of frequency allocations	6407
Maritime Services	
Public coast stations (land stations)	
Services, ship/shore radio- telephone/telegraphy	6287
Practice and Procedure	
Common carriers: applications	
Signatories, those eligible to be	6360
Common carriers: complaints, formal	
Answers to complaints	6482
Cross complaints	6479
Ex parte presentations, general information	
Purpose: to specify standards of conduct and procedure	6256
Hearing proceedings: presiding officer's rulings	
Final ruling, appeal from	6500
Parties, practitioners, witnesses	
Counsels for witnesses, rights and restrictions on	6342
Pleadings, briefs	
Extension of time, motions for	6485
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	6316, 6360
Reconsideration of a final FCC action, petition for	6312, 6392
Rulemaking proceedings: proceedings	
Reconsideration, petitions for	6343
Private Land Mobile Radio Services	
Policies governing the assignment of frequencies	
Coordination requirements	6325
Sharing of frequencies among services	6325
Public Mobile Service	
Applications and licenses-filing requirements	
Amendment of applications	6432
Defective applications	6429
Applications and licenses-processing	
Mutually exclusive applications	6432

Subject	Page
Opposition to applications	6434
Ownership changes and agreements to amend/dismiss	6432
Station authorization, transfer of control/assignment of	6434
Domestic public cellular radio telecommunications service	
Applications for markets below the top 90, ownership in	6432
Applications, amendment of	6432
Service areas	6429
Miscellaneous	
Discontinuance of station operation, procedure for	6434
Public land mobile service	
Frequencies, assignment of	6415
Technical operation	
Station identification	6434
Special Broadcast Services	
Aural broadcast auxiliary stations	
Frequency assignment	6320
Statutory Citations Other than Communications	
Administrative Procedure	
Information,public; agency rules, opinions, orders	6428, 6527
Tariffs (Schedules of Rates and Regulations)	
Rules, general	
Letters of transmittal: supporting information to be submitted	6289, 6268
Private line rate structure, guidelines for	6289, 6268
Specific tariff publications	
Notice requirements	6484
Tariffs, contents of	6289, 6499,

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
(Gary L. Acker d/b/a GOOD NEWS BROADCASTING) (Wichita Falls,	6251
(Jerry L. Roth d/b/a RICHMOND HILL BROADCASTING)(Richmond Hi	6353
000.047 C.F.R. § 1.773, Petitions for Suspension or Rejecti	6496
000.047 C.F.R. § 61.55	6486
000.204(a) lawfulness of charges; suspension	6266
000.204(a) lawfulness of new charges; suspension	6497
000.291 authority delegated	6497
000.291 delegated authority	6266
000.457 Records not routinely available for public inspectio	6428
001.027 Witnesses; Right to Counsel	6342
001.046 - Motion for Ext. of Time	6485
001.046 Motion for Extension of Time	6291
001.106 petitions for reconsideration	6312
001.106 Petitions for Reconsideration	6392
001.115 Application for Review	6316
001.115 Application for review of action taken pursuant to d	6360
001.1200 Ex Parte Communications	6256
001.1210 Ex Parte Rule Violation	6393
001.200 Ex Parte Communications	6483
001.302 Appeal, Denied	6500
001.429 Petition for reconsideration	6343
001.730 Other Forms of Discovery	6482
001.743 Who may sign applicaitons	6360
002.001 Terms and definitions.	6370
002.106, Table of Frequency Allocations	6407
015.247 Operations within the Bands 902-928 MHz,	6370
022.020 Defective application	6429
022.023 Amendment of applications	6432
022.029 Ownership Changes and agreements to amend	6432
022.030 Opposition to applications	6434
022.031 Mutually exclusive applicaitons	6432
022.039 Transfer of control or assignment of station auth	6434
022.213 Station identification	6434
022.303 Discontinuance of station operation	6434
022.501 (k) 470-512 MHz Band (Two-Way) /	6415
022.903 Cellular System Service Areas	6429
022.918 Amendment of Cellular Applications	6432
022.921 Ownership in applicaitons for cellular service	6432
022.932 Contect and form of RSA applications	6429
032.022 Comprehensive interperiod tax allocation	6447
032.4100 Net current deferred operating income taxes	6447
032.4340 Net noncurrent deferred operating income taxes	6447
043.043 Reports of Proposed Changes in Depreciation Rates	6263
047.000 C.F.R. § 69.4(b); Part 69, Subparts B & C	6278
061.038 Supporting information to be submitted	6289
061.038 Supporting information to be sumitted	6268
061.040 Private Line rate structure guidelines	6268
061.040 Private line rate structure guidelines	6289
061.054 Composition of tariffs	6268
061.054 Composition of tariffs	6289

061.054(j), 001.046 Extension of Time 6499
063.001 Contents of Applications 6279
063.001 Contents of Applications / 6525
064.702, Furnishing of Customer Premises Equipment 6537
073.1690 Modification of transmission systems. 6375
073.202 FM Table of Allotments 6321
073.202 FM Table of Allotments 6323
073.202 FM Table of Allotments 6339
073.202 FM Table of Allotments 6467
073.202 FM Table of Allotments 6469
073.202 FM Table of Allotments 6471
073.202 FM Table of Allotments 6473
073.202 FM Table of Allotments 6474
073.202 FM Table of Allotments 6522
073.202 FM Table of Allotments 6523
073.202 FM Table of Allotments 6541
073.207 Minimum distance separation between stations. 6344
073.207 Minimum distance separation between stations. 6375
073.211 Power and antenna height requirements. 6344
073.211 Power and antenna height requirements. 6375
073.213 Grandfathered short-spaced stations. 6375
073.316 FM antenna systems. 6344
073.3516 Specification of facilities 6446
073.3522 Amendment of Application 6316
073.3525 Agreements for removing application conflicts 6446
073.3525 Agreements for removing application conflicts 6487
073.3535 Agreements for removing application conflicts 6488
073.3555 Multiple ownership 6347
073.3555 Multiple Ownership 6456
073.3555 Multiple Ownership Rules 6489
073.606 TV Table of Allotments 6340
074.502 Frequency assignment 6320
076.163 Effective dates 6476
080.453 Scope of communications 6287
090.175 Frequency coordination requirements 6325
090.176 Interservice sharing of frequencies 6325
100.003 Definitions 6306
100.013 Application requirements 6292
100.019 License conditions 6292
100.019 License conditions 6306
100.021 Technical requirements 6292
100.021 Technical requirements 6306
100.051 Equal employment opportunities 6292
300.005(c)(1) Organization and Functioning of the Comm 6342
300.152 Application of Act 300.153 Definitions 300.201 Servi 6479
300.201 Service and Charges 6527
300.202 Discrimination and Preferences 6527
300.205 Commission Authorized to Prescribe Just and 6527
300.214 Extension of Lines 6279
300.214 Extension of Lines / 6525
300.214, Extension of Lines 6351
300.220 Accounts, Records, Memoranda, Depreciation Charges 6263
300.309 Action in Authorization / 6526
300.309, Action Upon Applications; Form of and Conds. Att. t 6524

300.311 Special Requirements with Respect to Certain Applica 6446
300.402 Proceedings to Enjoin, Set Aside, Annul, or Suspend 6446
300.403 Inquiry by Commission on its own Motion 6342
300.403 Inquiry by Commission on its Own Motion 6498
300.403 Inquiry by Commission on its own Motion 6527
300.409 General Provisions Relating to Proceedings - Witness 6342
400.05552 Public Information; agency rules, opinions, order, ... 6428
400.05552 Public Information; agency rules, opinions, order, ... 6527
500.005 - Integration, Qualitative 6552
500.035 - Integration, Quantitative 6552
500.045 - Diversification, Quantitative 6552
500.067 extraordinary special relief 6312
500.140 Comparative/ 6271
500.145 reconsideration, timeliness 6312
500.2035 integration of ownership into management, quantitat 6543
500.2045 diversification of control of mass media 6543
500.3005 Integration of Ownership into Management, Qualitati 6437
500.3035 Integration of Ownership into Management, Quantitat 6437
500.3110 Failure to Prosecute 6500
500.3125 Misrepresentation and Lack of Candor 6316
500.3125 Misrepresentation and Lack of Candor 6437
500.3170 Financial Disqualification 6393
500.3175 Financial Qualifications 6437
500.3180 Site availability 6316
500.3185 Staffing Issue, Disqualification 6393
500.3200 Reopening of record 6316
Jurisdictional separations 6542
NPRM, FM B/C STAS. (Klondike, SC), DA 89-970 6520
NPRM, FM B/C STAS. (Knoxville, IA), DA 89-969 6516
NPRM, FM B/C STAS. (Ottumwa, IA), DA 89-968 6518
NPRM, FM B/C STAS. (Plantersville, SC), DA 89-967 6514
Order; AT&T Promo. for Megacom/Megacom 800 Serv.; DA 89-788 6484
Part 25 Satellite Communications 6534
Part 74 - FM Broadcast Translator Stations 6459

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-352

In re Applications of

GARY L. ACKER D/B/A GOOD NEWS BROADCASTING (hereafter "Good News")	File No. BPH-871110MQ
RONALD M. CAMPAGNA (hereafter "Campagna")	File No. BPH-871110MZ
WRANGLER FM LIMITED PARTNERSHIP (hereafter "Wrangler")	File No. BPH-871110NF
SAMWILL BROADCASTING (hereafter "Samwill")	File No. BPH-871110NH
FRED R. MORTON, JR. (hereafter "Morton")	File No. BPH-871110NV

For Construction Permit
for a New FM Station
on Channel 288A in
Wichita Falls, Texas.

HEARING DESIGNATION ORDER

Adopted: July 25, 1989; Released: August 16, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Morton has submitted an informal objection to Good News' application pursuant to 47 C.F.R. § 73.3587. Good News has not responded to the objection. Morton contends that Good News' application is not substantially complete because it does not meet the tenderability criteria set forth in the processing guidelines for FM applications; therefore, Morton argues that Good News' application was inadvertently accepted for tender and must be returned. *See Report and Order* in Docket 84-750, *Amendment of Sections 73.3572 and 73.3573 relating to Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, 58 RR 2d 776 (1985). First, Morton challenges the sufficiency of the engineering section of Good News' application. Morton contends that Good News' application does not contain a transmitter site map and contour map which comply with the criteria of Appendix D to the *Report and Order* in Docket 84-750. Specifically, Morton argues that Good News has failed to submit a clear, legible and appropriately labelled 7.5 minute U.S.G.S. transmitter site map as required by paragraph 4(b) of Appendix D. *See* 58 FCC Rcd 2d at 168. Also, Morton argues that Good News has failed to meet the requirements of paragraph 4(g) of Appendix D because Good News failed to submit a contour map which clearly and legibly shows the legal boundaries of Wichita Falls, Texas, the principal community to be served. *Id.* We are not persuaded by Morton's arguments. Good News' proposal clearly indicates that its antenna will be located on an existing tower licensed to KKQV(FM) and K288D8. The Commission's records indicate the location and elevation of that tower. Therefore, the Commission could, "drawing on the application as a whole," confidently verify Good News' transmitter location by taking official notice of the data in its files pertaining to the licensed facilities. Thus, Good News was not required to file a transmitter site map. Moreover, the staff's engineering study reveals that Good News' contour map meets the tenderability requirements of Appendix D because the map is clear and legible with an accurate depiction of the principal community to be served.

3. Morton next contends that the section of Good News' application setting forth its other media interests is also insufficient for tender. Morton argues that Good News failed to set forth its other media interests in response to Section II, Item 4, lines 7 and 8 of FCC Form 301 as required by Appendix D of the *Report and Order* in Docket 84-750. Moreover, Morton notes that Good News states in the cover letter accompanying its application that it withdrew a previously filed application for FM service to Wichita Falls, but fails to provide information concerning this application in Section II, Item 5 of FCC Form 301 and responds in the negative to Item 5(b) of that Section which asks whether the applicant has any interest in a broadcast application which has been dismissed with prejudice by the Commission. Contrary to Morton's contentions, Good News' application is sufficient for tender. Appendix D to the *Report and Order* in Docket 84-750 requires applicants to indicate whether or not they or their immediate families have any pending applications or broadcast interests, so that the staff may begin a multiple ownership analysis. 58 RR 2d at 167. Appendix D specifically states that it is the *failure to respond* to questions 7 and 8 of Item 4 which renders an application not substantially complete and therefore not sufficient for tender. *Id.* Good News has provided a response to questions 7 and 8 of Item 4, Section II because its application contains the required information concerning its other media interests in Exhibit A, which is referenced elsewhere in its application. Good News' application with respect to disclosure of other media interests, therefore, is substantially complete and sufficient for tender, notwithstanding its failure to reference the appropriate exhibit in Item 4, Section II. Also, although Good News incorrectly responded to Item 5(b) of Section II concerning its previously dismissed application for Wichita Falls, such an inaccuracy does not render its application insufficient for tender. Appendix D does not reference question 5(b), Section II in its enumeration of information necessary for an application's substantial completeness. Moreover, Good News has not failed to respond to the question, but has provided information which is inconsistent with statements made in the cover letter accompanying its application. However, Good News will be required to submit an amendment clarifying its response to question 5(b) with respect to the previously dismissed application for FM service to Wich-

ita Falls, Texas referenced in its cover letter. Morton's informal objection to Good News' application will be denied.[1]

4. Information before the Commission indicates that Wrangler was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.,
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Wrangler's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

5. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Wrangler has responded to Item 5(e) in the negative.[2] However, Commission records indicate that G.G. Browder is a limited partner in the Crawford, Georgia and Rocky Mount, North Carolina proceedings, MM Docket Nos. 88-294 and 88-299, respectively, in which character issues have been added. Additionally, Samuel Q. Chaplin is a general partner in the Swanton, Ohio proceeding. However, Wrangler has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified below.

6. Good News, Wrangler, and Samwill propose to sidemount their antenna on the existing tower of KKQV(FM). However, the tower data submitted in Section V-B of FCC Form 301 of these applications is inconsistent with the data contained in Commission records. In Item 7(a)(2), Section V-B of FCC Form 301, Good News, Wrangler, and Samwill list the overall height above ground level (AGL) of the KKQV(FM) tower as 153 meters. Commission records show that the existing tower has a height of 158.5 meters AGL. In addition, Good News lists the height of the tower as 460 meters above mean sea level (AMSL), Wrangler as 456 meters AMSL, and Samwill as 461 meters AMSL. Also, in Item 2(b), Section V-B, both Good News, Wrangler, and Samwill list coordinates for the KKQV(FM) tower which are inconsistent with those contained in Commission records. According to the Commission's data base, the accepted coordinates for the tower are 33^0 53' 50" North Latitude, 98^0 32' 33" West Longitude. Good News and Wrangler each list the existing tower at 33^0 53' 47 " North Latitude, 98^0 32' 33" West Longitude which results in a discrepancy of 3 seconds for the North Latitude coordinate in both applications. Because Good News, Wrangler, and Samwill propose to locate on an existing tower licensed to an existing Commission licensee, and because specific reference is made to the existing tower in the applications in question, the staff could confidently and reliably verify the pertinent tower height and geographic site coordinates by taking official notice of the tower data found in the Commission's records for the licensed collocated facilities. Consequently, the applications of Good News, Wrangler, and Samwill are acceptable for filing. However, Good News, Wrangler, and Samwill will be required to file amendments with the presiding Administrative Law Judge within 30 days of the release of this Order correcting the tower height AGL and geographic coordinates listed for that tower.

7. Samwill amended its application on January 22, 1988 to disclose that its principals Mandel G. Samuels and Kyle Williams are employed by KJTL(TV), Wichita Falls, Texas. Samwill reported that Samuels is the assistant production manager for KJTL(TV) and that Williams is the local sales manager of KJTL(TV). Further, Samwill pledged that Samuels and Williams would terminate their employment with KJTL(TV) upon grant of the instant application and prior to commencement of program tests for the proposed FM station. In an amendment filed on August 1, 1988, Samwill reported that Mr. Samuels had terminated his employment at KJTL(TV). Accordingly, an appropriate divestiture condition as to Williams' employment at KJTL(TV) will be specified.

8. Morton has disclosed that he is 25% stockholder, officer and director of Broadco of Texas, Inc. (Broadco), licensee of KMGZ(FM), Lawton, Oklahoma. Morton further states that he is the director of engineering for Broadco and that he is Sales Manager of KMGZ(FM). Morton has pledged to divest himself of his interest in Broadco in the event that his application for new FM service in Wichita Falls, Texas is granted. However, Morton's divestiture pledge does not clearly indicate Morton's intent to terminate his employment with Broadco and Station KMGZ(FM), creating a potential violation of the Commission's cross-interest policy. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). Consequently, an appropriate cross-interest policy issue will be specified. To the extent that Morton has pledged to divest himself of his ownership interest in KMGZ(FM) in order to avoid a potential violation of the Commission's multiple ownership rules, 47 C.F.R. §73.3555, an appropriate partial divestiture condition will be specified.

9. *Other Matters*. In response to Section III, FCC Form 301 (October 1986), Campagna and Morton certified that they are in the process of securing sufficient funds to construct and operate the requested facilities for three months without revenue. Campagna and Morton also represented that they would submit the appropriate certification as amendments to their respective applications. Campagna submitted his financial certification in an amendment filed on August 15, 1988. Morton amended his application to certify his financial qualifications on February 7, 1989 submitting a signed copy of the certification on March 6, 1989. Each amendment was accompanied by a petition for leave to amend.

10. In his petition for leave to amend, Campagna simply states that the amendment "does not relate to his comparative qualifications, and thus no competing applicant will be prejudiced" by acceptance of the amendment. Morton claims that, although its financial amendment was filed after the time specified in 47 C.F.R. § 73.3522(a)(6) for filing amendments as of right, "[b]ecause Morton's amendment relates to financial qualifications, it is not proscribed by Section 73.3522(a)(6)." Morton also claims that "good cause" for amendment exists under the traditional standards set forth in *Erwin O'Connor Broadcasting Company*, 22 FCC 2d 140 (1970), and that acceptance of the amendment will neither (i) cause undue disruptions of the Commission's processes; (ii) gain for Morton a comparative advantage; nor (iii) unfairly prejudice other parties. Finally, Morton claims that his amendment "comports with the requirements of Section 1.65 of the Rules requiring him to maintain the accuracy of information contained in his application."

11. In the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985), *recon. denied*, 50 Fed. Reg. 43,157 (1985), the Commission adopted strict rules governing acceptance of amendments for FM facilities. These rules provide that amendments which address the acceptability *or grantability* of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the Public Notice announcing that the application has been accepted for tender. 50 Fed. Reg. at 19,941; *see also* 47 C.F.R. § 73.3522(a)(6). Notwithstanding the applicants' arguments that there would be no prejudice to any other applicant and that "good cause" for accepting the proffered amendments exists, the Commission's commercial FM processing rules are quite clear that parties may not perfect their applications (by correcting an acceptablility or grantability defect) after the time for filing amendments as of right has passed. We also reject Morton's attempt to invoke § 1.65 of the rules in filing his late amendment. Section 1.65 requires applicants to maintain the continuing accuracy of the information contained in their applications. This rule does not, however, require the acceptance of such amendments when, as in the instant case, they cure an acceptability or grantability defect in the underlying application and the period for filing curative amendments as of right has passed. *See, e.g., Donovan Burke*, 60 RR 2d 110, 112-13 (1986).[3] Sections 1.65 and 73.3522 are complementary, not conflicting, rules, and we will not allow applicants, under the guise of a 1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per § 73.3522. Accordingly, we find that applicants have failed to establish good cause for acceptance of their amendments and that these amendments should be dismissed as untimely. Campagna and Morton will be required to demonstrate their financial qualifications at hearing pursuant to an appropriate financial issue, which will be specified below.

12. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Pursuant to 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Campagna	August 15, 1988
Samwill	August 1, 1988
Morton	June 6, 1988

13. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Good News, Campagna, and Wrangler, would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

14. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the residence address of each of its principals. Samwill has not completed Item 4 correctly. Samwill's application, as amended, lists a post office box number as the residence address for its principal Mandel G. Samuels. Accordingly, Samwill will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Wrangler.

2. To determine whether Wrangler's organizational structure is a sham.

3. To determine whether Wrangler violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Wrangler possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by Good News, Campagna, and Wrangler would constitute a hazard to air navigation.

6. To determine with respect to Campagna and Morton, whether the applicants are financially qualified.

7. To determine, with respect to Morton, whether Morton's employment with Broadco of Texas, Inc. and Station KMGZ(FM) is consistent with the Commission's cross-interest policy and if not, whether a grant of the application would be in the public interest.

8. To determine which of the proposals would, on a comparative basis, best serve the public interest.

9. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That for the reasons stated in paragraph 2-3 above, the informal objection filed by Morton against Good News' application IS HEREBY DENIED.

18. IT IS FURTHER ORDERED, That Good News shall submit an amendment in accordance with paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That the petitions to dismiss filed by Samwill against the applications of Campagna and Morton ARE HEREBY DISMISSED.

20. IT IS FURTHER ORDERED, That Good News, Wrangler and Samwill shall submit amendments in accordance with paragraph 6 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

21. IT IS FURTHER ORDERED, That in the event of a grant of Samwill's application, the contruction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that its general partner Kyle Williams has terminated his employment and severed all connections with Station KJTL(TV), Wichita Falls, Texas.

22. IT IS FURTHER ORDERED, That in the event of a grant of Morton's application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that Fred R. Morton, Jr. has divested himself of all ownership interest in Station KMGZ(FM), Wichita Falls, Texas and Broadco of Texas, Inc.

23. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Campagna, Samwill and Morton ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That Samwill shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2), as amended, and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On July 7, 1987, Samwill filed petitions to dismiss the applications of Campagna and Morton, respectively. The petitions indicate that Campagna and Morton each indicated that they were *not* financially qualified but would file amendments regarding their finances when such had been arranged. Samwill claims that, due to this defect, the Campagna and Morton applications should either be dismissed as untenderable or given issues requiring them to demonstrate their financial qualifications at hearing. These pleadings, filed during the 30 day period following public notice of acceptance of the applications for Wichita Falls, Texas, which 47 C.F.R. § 73.3584 specifies for filing petitions to deny, are essentially pleadings which specify issues. Because the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of Part I of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleading in pending cases, the matters raised in Samwill's petitions will not be considered in this *Hearing Designation Order*. Additionally, the matters raised in the petitions are discussed in paragraphs 8 and 9, below. An opportunity to raise

any allegations contained therein will be afforded Samwill post-designation pursuant to 47 C.F.R. § 1.229. Accordingly, Samwill's petitions will be dismissed.

[2] On November 30, 1988, Wrangler filed an amendment which indicated, *inter alia*, that: (i) Wrangler principal Anthony G. Levan held an unattributable interest in Des Moines Broadcast Limited Partnership ("DMB"), an applicant for construction permit for a new FM station in Des Moines, Iowa; (ii) DMB voluntarily dismissed its application on August 12, 1988, *see Order*, FCC 88M-2649, released August 17, 1988); and (iii) the following issue had been designated against DMB: "whether there is an undisclosed party to DMB's application and whether DMB's organization structure is a sham."

[3] Morton claims that *Donovan Burke* is inapplicable, because there the applicant was attempting to cure an acceptability defect after the amendment period, not a grantability defect, as here. We disagree. The Commission has clearly stated that applicants may not correct acceptabilty or grantability defects after the time for filing amendments as of right. *See, e.g., Primemedia Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 14, 1989

TREATMENT OF *EX PARTE* CONTACTS IN PROCEEDINGS CONCERNING SHARED NETWORK FACILITIES AGREEMENTS

Consistent with Section 1.1206(b)(6) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(6), the Commission's pending investigation of the Bell Operating Companies' Special Access tariffs in CC Docket No. 85-166, Phase I, is a non-restricted proceeding. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (Com.Car.Bur.) at para. 29. Pursuant to Section 1.1208(c)(1)(i)(B) of the Commission's Rules, 47 C.F.R. § 1.1208(c)(1)(i)(B), the formal complaints listed in Appendix A are restricted proceedings. The informal complaints listed in Appendix B are exempt proceedings in conformance with Section 1.1204(a)(5) of the Commission's Rules, 47 C.F.R. § 1.1204(a)(5).

In order to avoid possible confusion and uncertainty on the part of the public, and in light of the unique circumstances present in these proceedings, that portion of Phase I of the pending CC Docket No. 85-166 tariff investigation that is before the Commission pursuant to the opinion of the Court in *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C.Cir. 1988) (*i.e.*, Shared Network Facilities Agreements issues) and the informal complaint proceedings listed in Appendix B will, effective upon release of this Public Notice, also be restricted proceedings. Any written presentations in the aforementioned portion of the CC Docket No. 85-166, Phase I, tariff investigation, the formal complaints listed in Appendix A, or the informal complaints listed in Appendix B shall be served on all parties of record in CC Docket No. 85-166 and all parties to any formal complaints and informal complaints listed in the Appendix C as well as all parties to any substantively related complaints that may in the future be filed. No oral presentations shall be made without notice to all such parties and an opportunity for them to be present.

This action is taken pursuant to Section 1.1200(a) of the Commission's Rules, 47 C.F.R. § 1.1200(a), which permits the Commission, in its discretion, to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires.

FEDERAL COMMUNICATIONS COMMISSION

Appendix A
Formal Complaints

E-89-088 MCI v. Bell Telephone Company of Pennsylvania
E-89-089 MCI v. Chesapeake and Potomac Telephone Company (C&P)
E-89-090 MCI v. C&P of Maryland
E-89-091 MCI v. C&P of Virginia
E-89-092 MCI v. C&P of West Virginia
E-89-093 MCI v. Diamond State Telephone Company
E-89-094 MCI v. New Jersey Bell Telephone Company
E-89-095 MCI v. Illinois Bell Telephone Company
E-89-096 MCI v. Indiana Bell Telephone Company
E-89-097 MCI v. Michigan Bell Telephone Company
E-89-098 MCI v. Ohio Bell Telephone Company
E-89-099 MCI v. Wisconsin Bell, Inc.
E-89-100 MCI v. Mountain States Telephone and Telegraph
E-89-101 MCI v. Northwestern Bell Telephone Company
E-89-102 MCI v. Pacific Northwest Bell Telephone Company
E-89-103 MCI v. Nevada Bell Telephone Company
E-89-104 MCI v. Pacific Bell Telephone Company
E-89-105 MCI v. New England Telephone and Telegraph Company
E-89-106 MCI v. New York Telephone Company
E-89-107 MCI v. South Central Bell Telephone Company
E-89-108 MCI v. Southern Bell Telephone and Telegraph Company
E-89-109 MCI v. Southwestern Bell Telephone Company
E-89-110 MCI v. American Telephone and Telegraph Company

E-89-140 Clark-Bader, d/b/a TMC Long Dist. v. Pacific Bell Telephone Company

E-89-143 Action Telcom v. Southwestern Bell Telephone Company

E-89-144 American Telco v. Southwestern Bell Telephone Company

E-89-147 Litel v. Bell Telephone Company of Pennsylvania
E-89-148 Litel v. C&P
E-89-149 Litel v. C&P of Maryland
E-89-150 Litel v. C&P of Virginia
E-89-151 Litel v. C&P of West Virginia
E-89-152 Litel v. New Jersey Bell Telephone Company
E-89-153 Litel v. Illinois Bell Telephone Company
E-89-154 Litel v. Indiana Bell Telephone Company
E-89-155 Litel v. Michigan Bell Telephone Company
E-89-156 Litel v. Ohio Bell Telephone Company
E-89-157 Litel v. Wisconsin Bell, Inc.
E-89-158 Litel v. Mountain States Telephone and Telegraph Company
E-89-159 Litel v. Northwestern Bell Telephone Company
E-89-160 Litel v. New England Telephone and Telegraph Company

E-89-161 Litel v. New York Telephone
E-89-162 Litel v. Pacific Bell Telephone Company
E-89-163 Litel v. Southern Bell Telephone and Telegraph Company
E-89-164 Litel v. South Central Bell Telephone Company
E-89-165 Litel v. Southwestern Bell Telephone Company

E-89-251 US Sprint v. Bell Telephone Company of Pennsylvania
E-89-252 US Sprint v. C&P
E-89-253 US Sprint v. C&P of Maryland
E-89-254 US Sprint v. C&P of Virginia
E-89-255 US Sprint v. C&P of West Virginia
E-89-256 US Sprint v. Diamond State Telephone Company
E-89-257 US Sprint v. New Jersey Telephone Company
E-89-258 US Sprint v. Illinois Bell Telephone Company
E-89-259 US Sprint v. Indiana Bell Telephone Company
E-89-260 US Sprint v. Michigan Bell Telephone Company
E-89-261 US Sprint v. Ohio Bell Telephone Company
E-89-262 US Sprint v. Wisconsin Bell, Inc.
E-89-263 US Sprint v. Mountain States Telephone and Telegraph Company
E-89-264 US Sprint v. Northwestern Bell Telephone Company
E-89-265 US Sprint v. Pacific Northwest Bell Telephone Company
E-89-266 US Sprint v. Nevada Bell Telephone Company
E-89-267 US Sprint v. Pacific Bell Telephone Company
E-89-268 US Sprint v. New England Telephone and Telegraph Company
E-89-269 US Sprint v. New York Telephone Company
E-89-270 US Sprint v. South Central Bell Telephone Company
E-89-271 US Sprint v. Southern Bell Telephone and Telegraph Company
E-89-272 US Sprint v. Southwestern Bell Telephone Company

Appendix B
Informal Complaints

IC-89-06158 Mid Atlantic Telecom, Inc. (MAT)

v.

Chesapeake & Potomac Telephone Company ("C&P")
C & P of Maryland
C & P of Virginia
C&P of West Virginia
Bell Telephone of Pennsylvania
Diamond State Telephone Company
Illinois Bell Telephone Company
Indiana Bell Telephone Company
Mountain States Telephone Company
New England Telephone & Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Ohio Bell Telephone Company
Pacific Northwest Bell Telephone Company
Pacific Telephone & Telegraph Company
South Central Bell Telephone Company
Southern Bell Telephone & Telegraph Company
Southwestern Bell Telephone Company
American Telephone & Telegraph Company

IC-89-06183 Telesphere Network, Inc. (TNI)

v.

Bell Telephone of Pennsylvania
Chesapeake & Potomac Telephone Company
C & P of Maryland
C & P of Virginia
C & P of West Virginia
Diamond State Telephone Company
Illinois Bell Telephone Company
Indiana Bell Telephone Company
Michigan Bell Telephone Company
Mountain States Telephone Company
Nevada Bell Telephone Company
New England Telephone Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Ohio Bell Telephone Company

Pacific Northwest Bell Telephone Company
Pacific Telephone & Telegraph Company
South Central Bell Telephone Company
Southern Bell Telephone Company
Southwestern Bell Telephone Company
Wisconsin Bell Telephone Company
American Telephone & Telegraph Company

IC-89-06184 Phone America of Carolina, Inc. (PAC)

v.

Bell Telephone of Pennsylvania
Chesapeake & Potomac Telephone Company
C & P of Maryland
C & P of Virginia
C & P of West Virginia
Diamond State Telephone Company
Illinois Bell Telephone Company
Michigan Bell Telephone Company
New England Telephone Company
New Jersey Bell Telephone Company
New York Telephone Company
Ohio Bell Telephone Company
Pacific Telephone & Telegraph Company
South Central Bell Telephone Company
Southern Bell Telephone Company
Southwestern Bell Telephone Company
American Telephone & Telegraph Company

IC-89-06255 Mid American Long Distance Company (Mid America)

v.

Illinois Bell Telephone Company
Mountain States Telephone Company
New Jersey Bell Telephone Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company
Southwestern Bell Telephone Company
Wisconsin Bell Telephone Company
American Telephone & Telegraph Company

Appendix C
Service List

Genevieve Morelli, Esquire
Patrick Lee, Esquire
MCI Telecommunications Corporation
1133 19th Street, N.W.
Washington, D.C. 20036

Alfred Whittaker, Esquire
Kirkland & Ellis
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Washington, D.C. 20005
(Illinois Bell; Indiana Bell; Michigan Bell; Ohio Bell; Wisconsin Bell)

J. Manning Lee, Esquire
Bell Atlantic
1710 H Street, N.W.
Washington, D.C. 20006
(Bell Telephone Company of Pennsylvania; Chesapeake & Potomac Telephone Company (C&P); C&P of Maryland; C&P of Virginia; C&P of West Virginia; Diamond State Telephone Company; New Jersey Bell Telephone Company)

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Renee Martin, Esquire
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(Illinois Bell; Indiana Bell; Michigan Bell; Ohio Bell; Wisconsin Bell)

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Russell M. Blau, Esquire
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Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 18, 1989

DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS PLEADING CYCLE ESTABLISHED

Comments are invited on the proposed revised depreciation rates and amortizations for twelve local exchange carriers. The rates for eleven of these carriers were developed in conjunction with the Commission's standard triennial depreciation rate review procedures, and, as such, represent this Bureau's thorough review of all depreciable telephone plant accounts. For the twelfth carrier, GTE Florida, only the COE-Analog Electronic Switching account rate is under consideration. In the Commission's most recent prescription order (FCC 88-427, released January 25, 1989), the rates for all GTE Florida's depreciable accounts were prescribed; however, because of questions regarding the carrier's switch replacement program, the Commission directed us to examine the COE-Analog Electronic Switching Account in more detail. We have completed this review and recommend a revised depreciation rate for the Analog Electronic Switching Account.

The rates under consideration are represented herein by the proposed expenses and composite rates shown in Attachment 1. These expenses and composite rates include amortizations previously prescribed by this Commission. Attachment 1 also lists the affected carriers and jurisdictions, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations) and the percentage change in expenses (proposed vs. current).

Each of these carriers filed studies with the Commission in support of its proposed depreciation rates. Our staff and the staffs of the state public utility commissions having jurisdiction over the carriers reviewed the carriers' submissions. The carriers' studies and the corresponding staff reviews were discussed by the three parties in correspondence, telephone conversations, and/or conferences. Each of the carriers thereafter formally filed updated studies which contained the data required by Section 43.43 of the Commission's rules. After considering all of this information, we are recommending the life, salvage and curve shape parameters which underlie the rates shown on Attachment 1. The expenses shown on Attachment 1 are annual amounts estimated by the companies and may not reflect actual expenses because January 1, 1989 plant balances are used and the rates and amortizations proposed may not be applicable for the entire year. The carriers' proposed effective dates are shown on Attachment 2.

Copies of the carriers' initial 1989 depreciation rate study filings, our preliminary review of those filings, the updated 1989 depreciation rate study filings and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street N.W., Washington, DC. Copying facilities are available in Suite 812, 2000 L Street.

Parties wishing to file comments on the proposals as summarized herein may do so by **September 8, 1989.** Replies may be filed by **September 22, 1989.** A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

ATTACHMENT 1

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Rate	Expense	Rate	Expense	Rate
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
BELL OF PENNSYLVANIA	6,772,820	456,005	6.7	478,298	7.1	22,293	4.9
C&P OF DISTRICT OF COLUMBIA	1,045,306	90,216	8.6	82,620	7.9	(7,596)	-8.4
C&P OF MARYLAND	3,828,190	277,941	7.3	289,585	7.6	11,644	4.2
GTE FLORIDA	2,981,913	229,564	7.7	238,721	8.0	9,157	4.0
GTE NORTH							
Illinois	978,956	65,933	6.7	54,671	5.6	(11,262)	-17.1
Indiana	1,108,015	83,999	7.6	79,060	7.1	(4,939)	-5.9
Pennsylvania	682,516	45,933	6.7	41,790	6.1	(4,143)	-9.0
MICHIGAN BELL	6,115,872	427,696	7.0	429,333	7.0	1,637	0.4
NEW YORK TELEPHONE	15,300,021	1,202,837	7.9	1,417,735	9.3	214,898	17.9
NORTHWESTERN BELL							
Iowa	1,428,358	115,496	8.1	97,598	6.8	(17,898)	-15.5
Minnesota	2,565,728	190,876	7.4	190,421	7.4	(455)	-0.2
Nebraska	1,019,655	89,754	8.8	84,241	8.3	(5,513)	-6.1
North Dakota	483,469	34,667	7.2	30,179	6.2	(4,488)	-12.9
South Dakota	508,309	38,918	7.7	34,120	6.7	(4,798)	-12.3
SOUTHERN BELL							
Florida	7,609,996	601,142	7.9	601,161	7.9	19	0.0
Georgia	5,138,498	416,688	8.1	434,384	8.5	17,696	4.2
North Carolina	2,811,720	218,149	7.8	241,899	8.6	23,750	10.9
South Carolina	1,860,988	140,339	7.5	158,944	8.5	18,605	13.3
SOUTHWESTERN BELL							
Arkansas	1,429,728	116,962	8.2	108,208	7.6	(8,754)	-7.5
Kansas	1,719,218	125,664	7.3	121,843	7.1	(3,821)	-3.0
Missouri	3,523,908	251,291	7.1	236,028	6.7	(15,263)	-6.1
Oklahoma	2,312,068	186,596	8.1	175,245	7.6	(11,351)	-6.1
Texas	12,484,965	939,320	7.5	885,159	7.1	(54,161)	-5.8
UNITED INTER-MOUNTAIN							
Tennessee	289,316	16,141	5.6	17,065	5.9	924	5.7
Virginia	126,449	7,584	6.0	8,003	6.3	419	5.5
WISCONSIN BELL	2,339,730	164,744	7.0	173,831	7.4	9,087	5.5
COMPOSITE TOTAL	86,465,712	6,534,455	7.6	6,710,142	7.8	175,687	2.7

Attachment 2

SUMMARY OF PROPOSED EFFECTIVE DATES

Carrier - Jurisdiction	Effective Date
BELL OF PENNSYLVANIA	January 1, 1989
C&P OF D.C.	January 1, 1989
C&P OF MARYLAND	January 1, 1989
GTE FLORIDA	January 1, 1989
GTE NORTH	
Illinois	January 1, 1990
Indiana	January 1, 1990
Pennsylvania	January 1, 1990
MICHIGAN BELL	January 1, 1989
NEW YORK TELEPHONE	January 1, 1990*
NORTHWESTERN BELL	
Iowa	January 1, 1990
Minnesota	January 1, 1990
Nebraska	January 1, 1990
North Dakota	January 1, 1990
South Dakota	January 1, 1990
SOUTHERN BELL	
Florida	October 1, 1989
Georgia	October 1, 1989
North Carolina	October 1, 1989
South Carolina	October 1, 1989
SOUTHWESTERN BELL	
Arkansas	January 1, 1990
Kansas	January 1, 1990
Missouri	January 1, 1990
Oklahoma	January 1, 1990
Texas	January 1, 1990
UNITED INTER-MOUNTAIN	
Tennessee	July 1, 1989
Virginia	July 1, 1989
WISCONSIN BELL	January 1, 1990

*New York Telephone requested an April 1, 1989, effective date for its COE Crossbar, COE Crossbar Adjunct and COE Circuit accounts.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH OPERATING COMPANIES Tariff F.C.C. No. 2	Transmittal No. 335
SOUTHWESTERN BELL TELEPHONE COMPANY Tariff F.C.C. No. 68	Transmittal No. 1822

ORDER

Adopted: August 16, 1989; Released: August 18, 1989

By the Chief, Common Carrier Bureau:

1. On July 7, 1989, Southwestern Bell (Southwestern) filed Transmittal No. 1822 providing for individual case basis (ICB) rates for Specialized Services for Williams Telecommunications Group, Inc. (WTG).[1] The tariff revisions are scheduled to become effective August 21, 1989. On July 12, 1989, Ameritech Operating Companies (Ameritech) filed Transmittal No. 335 providing for rates and charges for DS3 Customer High Capacity Service for Contel of Indiana, Inc., MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, and Consolidated Network Incorporated in the State of Indiana.[2] These revisions are scheduled to become effective August 26, 1989.

2. A petition to suspend and investigate Southwestern's tariff transmittal was filed by WTG on July 24, 1989.[3] In its petition WTG states that Southwestern proposes to charge it a monthly rate of $4,450 for 45 Mbps service between Southwestern's Clay Central Office and its National Central Office in Houston, Texas. WTG Petition at 2. WTG also states that Southwestern proposes to charge it nearly double that rate for virtually the same service between the Clay Central Office and Southwestern's Buffalo Central Office in Houston. WTG argues that Southwestern offers no justification for either of the rates or for the disparity in rates between the two services. *Id.* at 3-5.

3. Southwestern replies[4] that its rates are just and reasonable and not unreasonably discriminatory. Southwestern Reply at 2. It maintains that several years ago it established a price matrix as a basis for its ICB DS3 offering, by which similarly situated customers are treated the same. *Id.* at 4-5. Southwestern indicates that WTG was charged for service utilizing the existing price matrix, and that the rates charged for the two specialized services differed because of differences in mileage. *Id.* at 4. Southwestern also observes that in April 1989 WTG signed two contracts with Southwestern for specialized services. Southwestern contends that the contracts specified the services and prices proposed under the cases involved, and that WTG expressed no concern about Southwestern's rates at the time. *Id.* at 2.

4. On July 26, 1989, Indiana Digital Access (IDA) filed a petition to reject or to suspend Ameritech's Transmittal 335.[5] IDA alleges that Ameritech's cost support data do not satisfy Section 61.38 of the Commission's Rules. IDA Petition at 2. Specifically, IDA objects that Ameritech submitted no detail of its materials and labor costs. *Id.* at 3. It also complains that Ameritech failed to provide supporting formulas to show the methodology used in arriving at fully assigned annual costs from fully assigned investments. *Id.* at 2. Finally, IDA alleges that Ameritech's filings show a lack of coherence and clarity, and fail to address distance sensitivity issues. *Id.* at 3.

5. Ameritech replies[6] that the Commission's Rules do not require submission of the type of information sought by IDA. Ameritech Opposition at 2. It also maintains that ICB pricing, by its very nature, factors distance sensitivity into price development. *Id.* at 4. Ameritech concedes that the demand information supporting one of its tariff pages may need clarification, but maintains that any error is immaterial. *Id.* at 3-4.

6. The Common Carrier Bureau has reviewed the tariff transmittals and pleadings. We conclude that no compelling argument has been presented that the proposed tariffs are patently unlawful as to require rejection. We also conclude, however, that these transmittals should be included in our investigation of ICB rates, described below.

7. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.[7] The offerings proposed in the captioned transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the transmittals will be subject to the outcome of that investigation.

8. Accordingly, IT IS ORDERED that the petitions to reject or alternatively to suspend and investigate the captioned transmittals filed by Williams Telecommunications Group, Inc., and Indiana Digital Access ARE DENIED to the extent indicated above, and otherwise ARE GRANTED.

9. IT IS FURTHER IS ORDERED that Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 335 and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1822 are subject to the investigation instituted in CC Docket No. 88-136.

10. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day. For this purpose, we waive Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, and assign Special Permission No. 89-632.

11. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Ameritech Operating Companies and Southwestern Bell Telephone Company shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for the services which are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Southwestern Bell Telephone Company, Transmittal No. 1822, filed July 7, 1989.

[2] Ameritech Operating Companies, Transmittal No. 335, filed July 12, 1989.

[3] Williams Telecommunications Group, Inc., Petition To Suspend and Investigate, filed July 24, 1989 (WTG Petition).

[4] Southwestern Bell Telephone Company, Reply to Petition To Suspend and Investigate, filed Aug. 2, 1989 (Southwestern Reply).

[5] Indiana Digital Access Petition To Reject or To Suspend, filed July 26, 1989 (IDA Petition).

[6] Ameritech Operating Companies, Opposition to Petition To Reject or Suspend, filed Aug. 3, 1989 (Ameritech Opposition).

[7] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846; Second Supplemental Order Designating Issues for Investigation, DA 89-529, released May 11, 1989 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. No. 12

Transmittal Nos. 1662, 1674, 1675, and 1677

Custom-Designed Integrated Services

ORDER

Adopted: August 17, 1989; Released: August 18, 1989

By the Chief, Common Carrier Bureau:

1. These transmittals would establish four integrated service packages, Virtual Telecommunications Network Service (VTNS) Options VIII, IX, X, and XI, to be provided under American Telephone and Telegraph Company (AT&T) Tariff F.C.C. No. 12. Transmittal 1662 was filed on June 29, 1989, and is scheduled to become effective on August 19, 1989; the other transmittals were filed on June 30, 1989, and are also scheduled to become effective on August 19, 1989. Petitions to reject or suspend and investigate the provisions were filed by the Independent Data Communications Manufacturers Association, Inc. (IDCMA), MCI Telecommunications Corporation (MCI), US Sprint Communications Company Limited Partnership (Sprint), and Williams Telecommunications Group, Inc. (Williams).

2. VTNS Option VIII provides service in the United States, Puerto Rico, and the Virgin Islands, with calling capabilities defined by quantities of ports, port access telephone numbers, voice and data transmission capabilities (VTCs and DTCs), and authorization codes. The initial configuration is a network with 999 measured remote ports and 35 VTCs, with 52 DTCs at various speeds. Reductions in the initial configuration are limited to reductions of 50 percent for each of the service elements, absent subsequent agreement. The initial rates are established for a five-year period. Usage charges are specified by three rate schedules applied to call types that reflect the originating and terminating points' characteristics. Stepped volume discounts up to a maximum of 18 percent (for monthly measured charges exceeding $250,000) are applied to usage charges. AT&T states that VTNS Option VIII is subject to all general regulations applied to the previous seven VTNS options; and specialized provisions respecting partial discontinuance, notice and cure of noncompliance, and outage credit units are similar to those in effect for prior VTNS options. VTNS Option VIII incurs an installation charge of $192,000, and its minimum annual charge declines from $5.5 million in the first year to $3.2 million in the fifth year.

3. VTNS Option IX is limited to mainland United States service, and is provided for a three-year term over a network of 359 measured remote ports and 103 DTCs of various speeds. The initial configuration may not be reduced below a level of 305 ports and 88 DTCs. The basic charge is a flat-rated monthly charge of $95,000; measured charges reflect rate periods, mileage bands, and call configurations specified in three rate schedules. There is no installation charge, and AT&T states that nonrecurring costs are included in the recurring charges and will be recovered over the three-year service term. The minimum annual charge of $2.7 million, AT&T states, accommodates seasonal variations in customer traffic.

4. VTNS Option X provides service between the United States and the United Kingdom, and between the United States and France, with calling capabilities defined by quantities of Basic International Arrangements (BIAs) and DTCs.[1] Access to VTNS Option X is furnished by AT&T's domestic VTNS options, private line service under AT&T's Tariff F.C.C. No. 9 (or local channels under AT&T Tariff F.C.C. No. 11), or services from other carriers. The initial VTNS network for Option X provides 67 BIAs between the United States and the United Kingdom, 68 BIAs between the United States and France, and one 2.048 Mbps DTC each between the AT&T New York gateway and London and Paris. BIAs and DTCs may be added to or deleted from the original configuration under two rate schedules reflecting the size of change orders, but the total number of BIAs to either country may not be reduced below 50, or the DTCs reduced at all, without prior agreement between AT&T and the customer. The Option X rates are stabilized for a five-year period, with a minimum annual charge of $2.16 million.

5. VTNS Option XI provides service in the United States, Puerto Rico, the Virgin Islands, and between these points and Mexico, Canada, and other international locations. The Option XI calling capabilities are defined by quantities of the common VTNS service elements (listed in para. 2, *supra),* initially configured in a network with 1,734 measured remote ports, 427 VTCs, and 1,290 DTCs. All these service elements are located on the mainland with the exception of two DTCs which connect Paris and London with the New York City gateway. The number of ports may not be decreased below 1,000 or increased above 4,000, and the number of DTCs may not be decreased below 600, unless the carrier and customer otherwise agree.

6. Rates for Option XI are stabilized for a five-year period, with five successive one-year extension options. During the first four months of service, the basic charge is discounted to a flat rate of $0.310 million monthly in order to encourage orders for Option XI service elements; afterward, the basic monthly charge is a flat rate of $1.15 million. The minimum charge for VTNS Option XI is $125 million for the initial five-year service period, and $25 million per year if the optional extensions are utilized. The domestic calling capabilities apply a unified rate schedule to the usage-sensitive pricing component, with staged volume discounts up to 19 percent. The international calling capabilities are priced under three separate schedules, applied to calls to Mexico, Canada, and the other listed locations. The rate mileage bands and time-of-day periods in these schedules are the same as in other AT&T tariffs providing service to these international locations, and the combined usage under the three international schedules qualifies for staged volume discounts up to 10 percent.

7. IDCMA, in its consolidated petition to reject the four captioned revisions, states that the instant transmittals reflect continued violations of the Commission's Rules identified in its petition for reconsideration of the

Commission's *April 18 Order*.[2] IDCMA Petition at 2-4. IDCMA states that AT&T has expanded the scope of its Tariff 12 offerings to embrace comparatively small customers whose networks are not comparable in size to earlier clients, and created BIAs for Options X and XI as well as customer-specific rate schedules for Option XI switched international calls. Encompassing smaller customers, IDCMA argues, undercuts AT&T's pretense that VTNS is a measured competitive response to packages offered by other carriers, while the introduction of VTCs and related terms such as the "customer-specified nonport locations" proliferates poorly defined service elements, and compounds the difficulty of determining when a present or potential customer might be similarly situated to another customer with an extant VTNS configuration. *Id.* at 5-8. The combined effect, IDCMA asserts, is to preclude customers and systems integrators from determining whether they are similarly situated to those employing other extant configurations. *Id.* at 9.

8. In its joint petition to investigate, MCI states that VTNS is not offered to all customers who request it and adds that the underlying contracts are not limited to tariffed transmission services. MCI Petition to Investigate at 1-2. MCI asserts the Bureau's "occasional review" of underlying contracts should commence with VTNS Options VIII and XI, stating that substantial equipment is being provided free or at substantial discount to AT&T customers on condition that AT&T is selected as the transmission carrier. MCI further states that AT&T has extended favored status to the customer in Option XI, assuring it of further rate reductions to match subsequent tariff changes or VTNS offerings, an undertaking that conflicts with the "stabilized" rate language in the proposed tariff. *Id.* at 3-6. MCI also asserts generally that the prices for VTNS Options VIII through XI have not and could not be justified by any rational ratemaking approach, and that the pricing schedules are not related to traffic volumes or any known or claimed service efficiencies. *Id.* at 7.

9. Sprint, in its joint petition, criticizes AT&T's cost support for the four proposed options. Sprint contends that the purported ability of the VTNS options to achieve substantial earnings despite rates well below those charged for the unbundled component services raises serious doubt about the reasonableness of AT&T's cost allocation. Sprint also notes that AT&T has never precisely explained what its revenue-less-cost analysis represents. Sprint Petition at 4. In this regard, Sprint argues that because AT&T's revenue-less-cost analysis is here premised on calculation methods used in AT&T Transmittals 1649 and 1650, which were deficient, it necessarily provides an inaccurate forecast of profitability. *Id.* at 5. Sprint also asserts that because AT&T's revenue-less-cost analysis is based on models that use network-wide standard factors, it fails to include the particular costs associated with individual customers' requirements. *Id.* at 6-7.

10. In its petition against Transmittal 1662, Williams asserts that Option VIII is deficient because its terms leave AT&T unbridled discretion to determine whether future requests are from "substantially similar" customers, or whether requested modifications are reasonable. Williams Petition at 4-5. Williams also asserts that Option VIII contains geographic restrictions that fall within the Commission's prohibition. *Id.* at 4-6. Williams further asserts that AT&T's support materials rely on an unsubstantiated demand projection, and that the proposed volume discounts are unsupported by any quantitative justification. *Id.* at 7-9. Moreover, claims Williams, there are no cost data for major elements of Option VIII, and the rate design is seriously flawed. According to Williams, while AT&T contends that the cost of service is a function of the quantities of service elements and the usage levels projected for usage-sensitive facilities, the costs are not detailed, nor the derivation explained. *Id.* at 11-13. Williams also urges the Commission to require the filing of contracts underlying the VTNS options. *Id.* at 14 n.5.[3]

11. AT&T replies that the specification of ports, DTCs, VTCs, and BIAs in VTNS options does not unlawfully restrict these offerings, and that petitioners' contentions to that effect ignore the Commission's holding in the *April 18 Order* that the inclusion of precise numbers of service elements is not *per se* unlawful.[4] AT&T Reply at 3-4. As to differences in measured charges proposed for the several options, AT&T states that cost savings associated with individual offerings are reflected in these rates. *Id.* at 5- 6. AT&T also notes that while Tariff 12 is not a private line service offering, AT&T nonetheless has complied with rate structure guidelines contained in 47 C.F.R. Section 61.40. With respect to support materials, AT&T notes that the Commission has consistently refused to suspend or investigate tariff revisions on the basis of claims that AT&T is required to provide working papers or special studies detailing its methods. AT&T states that standard factors are used whenever costs cannot be directly assigned, and that directly assigned costs "may include, for example, the costs of network management and identified marketing expenses." *Id.* at 7-8.

12. Regarding the underlying contracts with customers, AT&T asserts that MCI has provided no new reasons to require the filing or review of contracts, and states that all relevant terms and conditions of the service offering are set forth in the tariff.[5] Finally, AT&T contends, the most recent VTNS options do not violate the requirement of Section 61.54(j) of the Commission's Rules that tariff terms be clear and definite, and no customer has complained of the tariffs' terms. *Id.* at 9.

13. The Common Carrier Bureau has reviewed AT&T's Transmittal Nos. 1662, 1674, 1675, and 1677, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the proposed tariffs are so patently unlawful as to warrant rejection, and that an investigation of Transmittal Nos. 1662, 1674, 1675, and 1677 is not warranted at this time.

14. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 1662, 1674, 1675, and 1677, filed by the Independent Data Communications Manufacturers Association, Inc., by MCI Telecommunications Corporation, by US Sprint Communications Company Limited Partnership, and by Williams Telecommunications Group, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The BIA permits a customer to originate or terminate non-measured voice calls or low-speed data calls between customer locations and designated international locations.

[2] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4939 n.70 (1989) (*April 18 Order*).

[3] Williams' separate petition filed against Transmittals 1674, 1675, and 1677 is essentially identical to the petition filed against Transmittal 1662. Williams also argues in the later petition that the proliferation of single customer proposals under Tariff 12 presents issues distinct from those considered in the context of any individual VTNS option. Williams Petition, Tr. Nos. 1674, 1675, and 1677 at 16-18.

[4] *April 18 Order*, 4 FCC Rcd at 4939 n.70.

[5] Should the Commission determine to inspect such contracts, AT&T asserts they should be given proprietary treatment to avoid competitive harm, citing Ward & Mendelsohn, P.C., 88 FCC 2d 1049, 1053 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-275

In re Applications of

JULIA S. ZOZAYA	File No. BPH-860703MI
FLAGSTAFF BROADCASTING FOUNDATION	File No. BPH-860707NQ
FLAGSTAFF BROADCASTING PARTNERSHIP	File No. BPH-860707OC

For Construction Permit for a
New FM Station on Channel 261C2
in Flagstaff, Arizona

Appearances

Margot Polivy on behalf of Julia S. Zozaya; *M. Fred Friedman* on behalf of Flagstaff Broadcasting Foundation; *Steven A. Lancellotta* on behalf of Flagstaff Limited Partnership; *Edward P. Taptich, James K. Edmundson*, on behalf of Flagstaff Broadcasting Partnership; and *Larry Miller* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: August 3, 1989; Released: August 14, 1989

PRELIMINARY STATEMENT

1. This proceeding involves the mutually-exclusive applications for a new FM facility at Flagstaff, Arizona. The three applicants are Julia S. Zozaya ("Zozaya"), Flagstaff Broadcast Foundation ("Foundation"), and Flagstaff Broadcasting Partnership ("FBP").[1] In the *Hearing Designation Order* (" *HDO* ") the following remaining issues were designated with respect to these three applicants:[2]

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

The *HDO* also indicated that, because of apparent differences in the sizes of the areas and populations to be served by the applicants, the areas and populations proposed by the applicants and the availability of other primary aural services in those areas could be considered under the standard comparative case. This question was mooted by the parties' stipulation that there is no significant difference in their respective proposed areas and populations (Tr. 25).

2. Hearing sessions were held on January 17 and 18, 1989, and the record was closed for all but limited purposes on January 18, 1989 (Tr. 366).

Findings of Fact

Julia S. Zozaya

3. Julia S. Zozaya, a 63 year old, legally blind, Hispanic female is an individual applicant (Zozaya Ex. 1, pg. 1; Tr. 36, 54, 132).

4. Zozaya proposes full time integration, at least 40 hours a week, as the proposed station's general manager. In that capacity she will be in overall charge of station operations, determining all station policy and supervising all station employees through appropriate management personnel. She will also handle all finance and will be in charge of development and implementation of the station's equal employment opportunity program (Zozaya Ex. 3; Tr. 52, 171). To effect this integration proposal, Ms. Zozaya proposes to relocate to Flagstaff, Arizona in the event of a grant (Zozaya Ex. 1, Tr. 170, 173).

5. Ms. Zozaya first expressed her interest to be integrated into day-to-day management on a full time basis in an Integration and Diversification Statement filed July 11, 1988 (FBP Ex. 6). By that statement she also advised that she was a pending applicant of and a proposed general manager of FM Channel 290A, Paradise Valley, Arizona (*Id.*).

6. In an Integration Statement filed on December 5, 1988 in the Paradise Valley proceeding, Ms. Zozaya amplified her proposed role as general manager to reflect that she would be integrated into day-to-day management on a full time basis (at least 40 hours per week) (FBP Ex. 7, Tr. 106). Also, in said Paradise Valley Integration Statement she alluded to the fact that she was an applicant for the Flagstaff Channel 261C2 and that a settlement agreement had been reached for which "formal documents (were) being prepared for filing with the Commission." (*Id.*).

7. The Paradise Valley Integration Statement, however, was not made available in the instant proceeding as required pursuant to the discovery procedures established by the parties' August 4, 1988 "Motion For Order Requiring Joint Document Production" and approved by *Memorandum and Opinion and Order*, FCC 88M-2698 (released August 22, 1988), (Tr. 47).

8. On January 3, 1989, at an emergency pre-hearing conference herein, Ms. Zozaya advised that she was ready to proceed with the comparative hearing, that the settlement agreement reached earlier with FBP had only been tentative, and, in fact, would not be implemented (Tr. 15). On the same day, in the Paradise Valley proceeding, Ms. Zozaya revised her pending integration proposal and reported that settlement negotiations in the Flagstaff proceeding had failed on December 27, 1988, and that as a result she is withdrawing her proposal to move to Paradise Valley and will reduce her Paradise Valley time commitment to a minimum of 30 hours per week (FBP Ex. 8; Tr. 110).

9. At hearing herein in her direct case, Ms. Zozaya did not allude to the integration commitment she had made in the Paradise Valley proceeding and indeed, her direct case was devoid of any information as to how she proposed to effectuate two separate integration proposals.

10. On redirect Ms. Zozaya stated that, if her applications in this proceeding and in Paradise Valley are both granted, she intends to reside in Flagstaff, Arizona, but will allocate one day a week to travel to her proposed Paradise Valley station. She will hire a station manager for the Paradise Valley station and will supervise its operations primarily by telephone. From 6:00 a.m. to 10:00 a.m., her time will be spent on the telephone pursuing national advertisers on the East Coast; she will divide this time equally between the two stations. From 10:00 a.m. to 5:00 p.m., her time will be devoted solely to the Flagstaff station. From 5:00 p.m. to 8:00 p.m., she will switch her attention back to Paradise Valley.

11. The distance between Flagstaff, Arizona and Paradise Valley, Arizona, is over 135 miles (Official Notice Taken). Ms. Zozaya thought the round trip between Flagstaff and Phoenix, of which Paradise is an enclave, would take about three hours (Tr. 79). The legal speed limit on Arizona highways is 65 m.p.h. (ARS § 28-702.03).

12. Ms. Zozaya has made no divestiture commitment with respect to either the Flagstaff or the Paradise Valley station in the event both of her applications are granted (Tr. 51).

13. Ms. Zozaya has been involved since the 1960's with regional, state and national civic organizations serving minorities, the blind, the elderly, women, migrant workers, the business community and the general public. Representative of those organizations with programs affecting the proposed service area include:

Arizona Academy of Town Halls 1976
Board Member 1976-78

Arizona Association of VICA
(Vocational/Industrial Clubs of America) 1982

Arizona Council of Churches 1973-75
Migrant Committee 1973-75

Arizona Hispanic Chamber of Commerce 1978

Arizona Mexican American Chamber of Commerce 1973-78
Incorporating Officer 1973
Board Member 1973-78
President 1976, 1978

Arizona Mexico Commission 1985

Arizona Rehabilitation Association 1970-76

Association Nacional pro Persones Mayores 1971-78
Organizer and charter member
ABRAZAR (founder) 1974-78

Central Arizona Health Systems Agency 1976-79
Board Member 1976-79

Chicanos por la Causa 1975-78

League of Mexican American Women 1968-72
Charter Member
Legislative and Publicity Chairman

LULAC (League of United Latin American Citizens) 1965
Arizona Newsletter editor 1972
National Vice President for Women 1970, 1972

S.E.R. Jobs for Progress, Inc. 1982
State Director 1988
State Publicity Chairman 1968
National Chairman Women's Affairs Committee 1971-73
National Chairman Senior Citizen's Affairs Committee 1971-74

Motivation of Arizona, Inc. 1967-69

MUJER, Inc. 1982-86

National Association for Community Development 1968-72

National Hispanic Chamber of Commerce 1965-80
Founder
Regional Vice President 1975-77

National Intergroup Relations Association 1967-70

National Volunteers Organization for Independent Living 1971-78
President 1971

National Federation of the Blind 1960-67
First Vice President 1965
Legislative Chairperson 1967
Program Chairman 1967
Public Relations Chairperson 1960-64; 1967

Sun Sounds 1979
Community Development Board, current member
Organizing Committee 1978-79

Vesta Club 1965 (now honorary)

Zenith Club (now Arizona Federation of the Blind) 1964-67
First Vice President 1965-67
Publicity Chairman 1964-67
Ways and Means Committee Chair 1964-66

(Zozaya Ex. 1, pgs. 2-4).

14. Ms. Zozaya has also been appointed to a number of state and Federal advisory groups, including the following:

Advisory Committee to the United States Secretary of Labor on Rights and Responsibilities of Women 1972-75

Consultant to Special Senate Committee on Aging 1970-73

Governor's Commission on the Blind and Visually Impaired 1986

Governor's Committee on Employment of the Handicapped 1971
Board Member 1983

National Advisory Board to Womens' Bureau, United States Department of Labor 1971-73

National Bicentennial Advisory Council 1975-77

National Council on Aging, Inc. 1972, 1975

President's Committee on Employment of the Handicapped 1971-78 (still serves as resource person)

State Advisory Council on Vacational-Technical Education 1980-82

White House Conference on Aging 1971

White House Conference on Small Business 1980

(Zozaya Ex. 1, pg. 4).

15. Ms. Zozaya's civic activities currently occupy about 25 hours a week (Tr. 152, 176-77). In the event of a grant, Ms. Zozaya would continue with her civic activities. Ms. Zozaya views her involvement in many of her civic activities as vital in addressing the community's need relative "to program and to survey." (Tr. 179). However, the record does not reflect how Ms. Zozaya can accomplish her civic involvement commitment in light of her 70 hour schedule, should she receive a grant here and in Paradise Valley.

16. With respect to broadcast experience, between 1966 and 1978, Ms. Zozaya developed and broadcast a weekly 15-minute talk show as part of her employment as an Information and Resource Specialist and a Manpower Specialist with the Arizona Department of Economic Security. She also arranged radio press conferences, as well as public service time to be used for special talk shows and other programs geared to educating the community (Zozaya Ex. 1, pg. 1). Ms. Zozaya owned and operated station KNNN(FM), Phoenix, Arizona, from 1981-1984. She served as general manager and was responsible for finances, sales, program design and staffing. Ms. Zozaya estimated that she worked from 6:00 a.m. to 10:00 p.m. fulfilling these duties (Tr. 161, 163).

17. Julia Zozaya owns a 1 percent interest in The Seven Hills Television Company, licensee of UHF television station KTVW, Phoenix, Arizona, which she will divest in the event of a grant (Zozaya Ex. 2). She is also an applicant for FM Channel 290A, Paradise Valley, Arizona (*Id.*). Ms. Zozaya has no other media interest of any kind (*Id.*).

18. Julia Zozaya proposes installation of an auxiliary transmitter and an auxiliary generator to ensure continued station operations in the event of electric power loss (Zozaya Ex. 4).

Flagstaff Broadcasting Foundation

19. Foundation is a non-stock, not-for-profit corporation formed in the District of Columbia (Foundation Ex. 1). It has five principals, each of whom serves as a director on Foundation's Board of Directors and each of whom has one vote on that Board (*Id.*). Foundation Directors are: LaJoy Brandon, Teresita Serrano, Shelly Hall, Stella (Alfara) Hamilton and Charlotte Beyal (*Id.*).

20. None of the five directors of Foundation intends to integrate either full time or part time into the day-to-day management of Foundation's proposed station. [3] All five will be responsible for establishing station policies regarding all aspects of the operation of the station, including programming, personnel, sales, financial, technical and any other matters. They will also be responsible for supervising the effectuation of those policies. No procedures for monitoring the implementation of the Board's policies have been established. The directors intend to hire staff who will work at the station on a day-to-day basis and implement the Board's policies. None of the Board members intends to withdraw from her current employment if Foundation's application is granted, but they each will withdraw from civic activities if necessary in order to fulfill their respective responsibilities on the Foundation Board of Directors (Foundation Ex. 3, pg. 1; Tr. 209, 211-13, 270, 283).

21. LaJoy Brandon is a Black woman and a life-long resident of Phoenix, Arizona (Foundation Ex. 4, pg. 1).

22. Teresita Serrano is an Hispanic woman who has lived in the Phoenix, Arizona, area for 34 years. She is a retired surgical technologist (Foundation Ex. 5, pg. 1).

23. Shelly Hall is a Native-American woman, registered with the Flathead Tribe, who has lived in Flagstaff since 1969 (Foundation Ex. 6, pg. 1).

24. Stella Alfara Hamilton is an Hispanic woman who has lived in the Flagstaff area, within Foundation's proposed service area for 36 years (Foundation Ex. 7, pg. 1).

25. Charlotte Beyal, is a Navajo woman who has resided in Flagstaff, within Foundation's proposed service area, for 37 years (Foundation Ex. 8, pg. 1).

26. *Auxiliary Power*. Foundation proposes to install auxiliary power generation equipment to assure the station's ability to continue full operation in the event of a power failure (Foundation Ex. 9, pg. 1).

27. *Diversification*. Neither Foundation nor any of its principals holds an interest in any medium of mass communication (Foundation 2, pg. 1).

Flagstaff Broadcasting Partnership

28. FBP is a general partnership formed under the laws of Missouri, in which Boyd W. Fellows and Bradley S. Walpole each hold a 50 percent equity and voting interest (FBP Ex. 1).

29. Both Fellows and Walpole will work full time, at least 40 hours per week, at FBP's proposed station (FBP Ex. 3, pg. 1; FBP Ex. 4, pg. 1).

30. FBP's Partnership Agreement provides that "[i]f the partners are successful in obtaining from the Federal Communications Commission a permit to construct and operate a new FM broadcast station at Flagstaff, Arizona, they will then devote full time to the Flagstaff FM station construction and operation." (Zozaya Ex. 7, pg. 3).

31. Fellows will serve as the general manager of FBP's proposed station, and will supervise the management and operation of the station. Fellows' duties will include primary responsibility for supervision of programming, news, hiring, public service/community affairs activity, sales and financial planning. Walpole will serve as the station manager of FBP's proposed station, and will have primary responsibility for the technical operations of the station, sharing responsibility with Fellows in the supervision of programming, public service/community affairs, news, hiring, sales and financial planning (FBP Ex. 3, pg. 1; FBP Ex. 4, pg. 1). Currently, Fellows resides in Sturgeon Bay, Wisconsin, but he will live in Flagstaff if FBP's application is granted (FBP Ex. 3, pg. 1; Tr. 288, 309).

32. Fellows has 33 years of broadcast-related experience (FBP Ex. 3, pg. 1, 2). Currently, Fellows is the general manager of WDCW(FM), Sturgeon Bay, Wisconsin. Fellows is not employed under a contract, and is not obligated to remain at his position in Sturgeon Bay (FBP Ex. 3, pg. 2; Tr. 309-310, 316, 320, 330-331).

33. Walpole has been a member of the International Brotherhood of Electrical Workers, Local Four, since 1979. Walpole currently resides in St. Louis, Missouri, but will reside in Flagstaff if FBP's application is granted (FBP Ex. 4, pg. 1; Tr. 343, 348).

34. From 1975 through 1979, while a high school student, Walpole was an engineer and announcer at KLSR(FM), a radio station operated by the Lindberg, Missouri, School District. From 1977-78, Walpole was the chief engineer of KLSR (FM). At the age of sixteen years, Walpole was granted a first class radio telephone license. From 1979 through 1983, Walpole worked as a staff engineer at KSDK(TV), St. Louis, Missouri; in 1983, he was promoted to technical director of the station, a position he held until 1985. In 1985, Walpole moved to CBS-owned and - operated KMOX-TV (now KMOV-TV), St. Louis, Missouri, to become a staff engineer; he was promoted to technical director of KMOV-TV in 1986, which position he currently holds. Walpole's broadcast experience has been centered in technical operations, but includes supervisory experience, as well (FBP Ex. 4, pg. 1; Tr. 344, 349-350).

35. In addition to his position as technical director of KMOV-TV, for the past 4 1/2 years, Walpole has owned and operated Electronic Systems, a small business which markets, installs and maintains satellite systems and other electronic equipment. In connection with this business, Walpole has done electronics work in both broadcast and industrial contexts. Walpole is a sole proprietor of Electronics Systems. He runs Electronic Systems out of his residence, and spends an average of two hours per week involved with the business (FBP Ex. 4, pg. 2; Tr. 350-352, 360).

36. *Auxiliary Power.* FBP intends to install auxiliary power generation equipment to assure the station's ability to continue full operation in the event of power failure (FBP Ex. 5, pg. 1; Tr. 302).

37. *Diversification.* FBP has no interest in any medium of mass communication (FBP Ex. 2, pg. 1; Tr. 297).

38. Fellows is President, Treasurer, a director and 60 percent voting shareholder of Fellows Broadcast Service, Inc., licensee of WDCW(FM), Sturgeon Bay, Wisconsin, a Class A facility, operating at substantially maximum power. Fellows, as an individual, was awarded the Sturgeon Bay permit on August 7, 1987 in a comparative proceeding resolved by settlement. Operations began on April 18, 1988. The permit was transferred to the corporation in April, 1988, at which time Fellows' interest decreased to 60 percent. In a July 11, 1988, amendment to FBP's application, Fellows pledged that, in the event of a grant of FBP's application, he would divest himself of all his interest (*i. e.*, general managership, office, directorship, shares) in Fellows Broadcast Service, Inc. (FBP Ex. 2, pg. 1; FBP Ex. 3, pg. 2; Zozaya Ex. 5, pg. 5, Official Notice; Tr. 290-291, 309-311, 329, 330, 337, 340-341).

39. Sturgeon Bay is approximately 1,400 miles from Flagstaff (Official Notice Taken; FBP Findings, Ex. 2). As of February 11, 1989, in addition to WDCW(FM), there were three FM stations, one AM station and one television station licensed to the community of Sturgeon Bay (Official Notice Taken; FBP Findings Ex. 3).

40. The other voting shareholders of Fellows Broadcast Service, Inc. are Fellows' brothers-in-law: Tom Danis, Jim Danis and David Danis. One of the other Fellows Broadcast Service, Inc. shareholders works at WDCW(FM). David Danis is secretary of the corporation and also a director. There are a total of four directors; Tom Danis and Jim Danis are the other two directors (Tr. 311-312, 329-330).

41. Other than WDCW(FM), Fellows has no interest in any medium of mass communication (FBP Ex. 2, pg. 1; Tr. 290, 330).

42. Walpole has no interest in or connection with any medium of mass communication, except for his position as technical director of KMOV-TV, from which he will resign if FBP's application is granted (FBP Ex. 4, pg. 1).

CONCLUSIONS OF LAW

Diversification

43. *Zozaya* owns no attributable mass media interests. Ms. Zozaya holds a 1 percent interest in Seven Hills Television, licensee of UHF television station KTVW, Phoenix, Arizona, but timely has pledged to divest that interest if her application herein is granted.

44. *Foundation* owns no attributable mass media interests.

45. *FBP.* One of FBP's two fifty percent partners, Fellows, is a 60 percent shareholder, president, treasurer and director of Fellows Broadcast Service, Inc., licensee of WDCW(FM), Sturgeon Bay, Wisconsin. At the "B" cut-off date, Fellows' interest in Fellows Broadcast Service, Inc. was 100 percent. Fellows had committed to divest himself of his entire interest in the Sturgeon Bay station if

FBP's application herein is granted, but not until after the "B cut-off date. Consequently, Fellows' interest in WDCW(FM) must be considered in assessing the diversification factor in this proceeding. *See Santee Cooper Broadcasting Co. of Hilton Head, Inc.*, 99 FCC 2d 781, 794, 57 RR 2d 662, 674 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 469, 57 RR 1363 (Rev. Bd. 1985), *modified on review*, 59 RR 2d 730 (1986).

46. The weight to be given to media interests in a comparative broadcast proceeding is directly related to the type of media, size of ownership interest, proximity of media to applicant's proposed community of license, significance of media in terms of area covered, size of audience, number of facilities, etc., significance in terms of regional or national coverage, and significance with respect to other media in their respective location. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965); ("Policy Statement") *The Reginald A. Fessenden Educational Fund, Inc.*, 59 RR 2d 1255, 1259 (Rev. Bd. 1985). Fellows' ownership interest in FBP is 50 percent which makes FBP's interest in WDCW, Sturgeon Bay, Wisconsin no greater than 50 percent.[4] Station WDCW is 1,400 miles from Flagstaff, is a Class A facility and is one of five broadcast stations licensed to Sturgeon Bay. Based on these considerations, only a very slight-to-slight diversification demerit will be assessed against FBP. (Compare *Reginald A. Fessenden Educational Fund, Inc., supra*, where a slight-to-moderate diversification demerit was assessed because a controlling 50.5 percent shareholder was attributed with 33.8 percent ownership in an FM station located 150 miles from the proposed community of license.)

47. Foundation argues that FBP should be charged with a diversification demerit for Walpole's position as technical director of WMOV-TV because no divestiture was made prior to the "B" cut-off date. However, the position of technical director is not an interest attributable under the diversification criteria. *See Talleyrand Broadcasting*, 103 FCC 2d 476, 478, 59 RR 2d 563, 565 (Rev. Bd. 1985). Consequently, no divestiture commitment was necessary to avoid a demerit.

Integration

Zozaya

48. Ms. Zozaya has proffered integration proposals in two proceedings– Paradise Valley as well as Flagstaff. Ms. Zozaya's competing applicants urge the outright dismissal of Ms. Zozaya's Flagstaff application on the grounds that Ms. Zozaya's two integration proposals are contradictory and that Ms. Zozaya lacked candor in processing her Flagstaff application.

49. Ms. Zozaya's competing applicants charge that Ms. Zozaya has engaged in gamesmanship which amounts to an abuse of the Commisison's process. It appears that on December 5, 1988, without amending her Flagstaff application, Ms. Zozaya pledged in the Paradise Valley that she will be integrated full time as general manager and sought an enhancement credit for future local residence. At the same time she advised the Presiding Judge in Paradise Valley that a settlement had been reached in Flagstaff which would result in her application therein being dismissed. On December 27, 1980 in the Flagstaff proceeding Ms. Zozaya advised FBP's counsel that the settlement agreement was no longer in force and by declaration dated December 29, 1980 she reaffirmed her full time integration commitment. It wasn't until January 3, 1989 that Ms. Zozaya amended her 40 hour integration proposal in Paradise Valley reducing her commitment to 30 hours and eliminating her claim for local residence credit. Ms. Zozaya's competing applicants maintain that Ms. Zozaya was less than candid in not reporting in this proceeding the December 5, 1989 pledge made in the Paradise Valley proceeding, thereby getting an unfair advantage in both proceedings.[5]

50. Additionally, FBP argues that Ms. Zozaya was required by the discovery directives in this proceeding to produce the integration statement which she filed in Paradise Valley and in failing to do so frustrated the Commission's process. And further, FBP sees in Ms. Zozaya's memory lapses during her cross-examination at hearing more evidence of her lack of candor.

51. Ms. Zozaya's application will not be dismissed. Although it may fairly be said that Ms. Zozaya "played her hand close to the vest," the record evidence does not indicate that her conduct was so egregious as to warrant the dismissal of her application. There is no evidence in the record that demonstrates that Ms. Zozaya intended to float two contradictory full time proposals. The charge is speculative. It is not contested that Ms. Zozaya pledged her 40 hour integration commitment in Paradise Valley only after an agreement in principle to settle had been reached in Flagstaff. In any event, the parties herein were aware of Ms. Zozaya's application in the Paradise Valley proceeding and Ms. Zozaya's failure to produce the Paradise Valley integration statement did not significantly prejudice any of the competing applicants herein.

52. The matter of Ms. Zozaya's "memory lapses" at hearing is also without significance. The competing applicants had full opportunity to bring out all the facts which they felt necessary.

53. However, Ms. Zozaya's proposal to work full time as general manager in Flagstaff cannot be credited in light of Ms. Zozaya's concurrent commitment to be integrated on a day-to-day basis into management in Paradise Valley. Ms. Zozaya contends that the fact that she is also an applicant for Paradise Valley is irrelevant. Ms. Zozaya argues that her integration proposal in the Paradise Valley proceeding is inchoate and should be discounted for comparative evaluation purposes. She advocates that co-pending inchoate integration proposals should be treated just as the Commission treats co-pending applications for diversification purposes. This argument is rejected. There is no Commission precedent for such a construction. In fact, it is Commission policy to accord no credit to an integration proposal which is contingent or inconsistent with another pending integration proposal. *See e.g., Houston Family Television, Limited*, 101 FCC 2d 661 (Rev. Bd. 1985).

54. A review of the record shows that Ms. Zozaya as yet does not have a clearly formulated plan as to her work schedule for both the Flagstaff and Paradise Valley stations. She envisions 14 hour work days but has not made any allowances for lunch and supper. She understands that the demands of each station may be such as to require more or less than the time anticipated but has set no parameters as to assure the integrity of the respective integration commitments. She proposes to work 70 hours a week at two locations 135 miles apart, but has made no allowances for travel time. Her counsel argues that travel time will add no time because it will occur on the one day Ms. Zozaya will devote to Paradise Valley. But the 30

hour commitment to Paradise Valley does not include travel time and yet the Paradise Valley commitment cannot be effectuated without Ms. Zozaya's making the trip. The truth of the matter is that travel time to Paradise Valley will extend her overall time commitment by the amount of time it takes to make a round trip between Flagstaff and Paradise Valley, in this case at least four hours. Ms. Zozaya's overall time commitment then to effectuate her two integration proposals is a minimum of 74 hours and this does not allow any time for civic activities which Ms. Zozaya considers vital "in addressing the community's need relative to program and to survey. (Tr. 179). That this rigorous schedule is to be performed by a 62 year old woman who has been certified as being legally blind simply is not credible.

55. Furthermore, Commission precedent indicates that Ms. Zozaya's integration proposal is not capable of being effectuated as a matter of law. It has been held that a 70 hour work week is the outer limit for integration credit. *See Berryville Broadcasting Co.*, 70 FCC 2d 1, 10-11, 44 RR 2d 1325, 1337-1338 (Rev. Bd. 1978). A principal, therefore, who proposes to work more than 70 hours per week may not receive credit for proposing to be the station's full time general manager. *See Pentecostal Revival Assn., Inc.*, 1 FCC Rcd 842, 61 RR 2d 1267 (Rev. Bd. 1986). Ms. Zozaya's claim for integration is disallowed therefore for the additional reason that her proposal cannot be effectuated as a matter of law.[6]

56. FBP also argues that integration credit for Ms. Zozaya should be disallowed in view of her prior failure to fulfill her integration pledge with respect to station KNNN(FM) Phoenix, Arizona. According to FBP Ms. Zozaya had promised to be integrated as general manager and sales manager and would institute specialized programming for the Hispanic community of Phoenix. FBP states that this promise was aborted when Ms. Zozaya sold her interest in KNNN(FM), but made no provision in the selling agreement for Hispanic programming. The argument won't wash. Ms. Zozaya was entitled to integration credit in the Phoenix, Arizona. No showing has been made that she intended to sell the station when she applied for it. The fact that the selling agreement made no mention of the specialized format is of no consequence because the Commission approved the sale.

57. Were Ms. Zozaya's integration proposal deemed creditable, it would have been enhanced by Ms. Zozaya's promise of future local residence, her minority and female status and her past broadcast experience. No credit would have been given for civic participation. Even though Ms. Zozaya had been involved in many state-wide activities, the record is devoid of any civic activities dealing directly with Flagstaff.

58. Ms. Zozaya will receive credit for auxiliary power.

Flagstaff Broadcasting Foundation

59. Foundation proposes no integration of its voting ownership into the day-to-day management of its proposed station. Foundation, therefore, is entitled to no quantitative integration credit. *See Policy Statement*, 1 FCC 2d 395, 5 RR 2d 1909 ("no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis").

60. Because Foundation proposes no quantitative integration, it is entitled to no credit for qualitative enhancement by virtue of its principals' minority status or residence. *See e. g. Radio Jonesboro, Inc.*, 100 FCC 2d 941, 57 RR 1564 (1985) (credit for minority ownership awarded only to extent that minority owners will participate in management); *The New Continental Broadcasting Co.*, 88 FCC 2d 837, 50 RR 2d 1124 (to the same effect); *cf. Cannon Communications Corp.*, 101 FCC 2d 169, 58 RR 2d 950, 959 (Rev. Bd. 1985), *review denied*, FCC 86-214 (rel. May 15, 1986), *remand*, FCC 88-215 (rel. July 11, 1988) (qualitative attributes may enhance an application, but may not overcome a clear quantitative difference).

61. Foundation has proposed auxiliary power.

Flagstaff Broadcasting Partnership

62. FBP will receive 100 percent quantitative integration credit for Fellows' and Walpole's proposed participation. There is no evidence that their commitments will not be carried out. In addition to 100 percent quantitative integration credit, FBP's proposal is enhanced by both partners' commitment to reside in Flagstaff if FBP's application is granted, both partners' extensive broadcast experience, and an auxiliary power proposal. *See Policy Statement*, 1 FCC 2d 395-397, 5 RR 1910-1913; *Addendum to Policy Statement*, 2 FCC 2d 667, 6 RR 2d 861 (1966).

ULTIMATE CONCLUSIONS

63. *Diversification.* Neither Foundation nor Ms. Zozaya have any media interests attributable to them. Because Fellows' divestiture commitment concerning his interest in WDCW(FM) may not be credited, FBP is assessed a very slight to slight diversification merit.

64. *Integration.* Foundation proposes no integration and will receive no credit. Zozaya, although it proposes integration, will receive no credit because its integration proposal is incapable of effectuation. FBP is entitled to full integration credit enhancement by 100 percent future local residence and 100 percent broadcast experience. FBP's proposal is also credited for auxiliary power. In sum, FBP is credited with a substantial integration preference.

65. The winner then is FBP. Notwithstanding the very slight to slight diversification demerit assessed against FBP, its substantial integration preference makes it the best qualified applicant. The public interest, therefore, would best be served by a grant of the FBP application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Flagstaff Broadcasting Partnership (File No. BPH-860707OC) IS GRANTED, and the applications of Julia S. Zozaya (File No. BPH-860703MI) and Flagstaff Broadcasting Foundation (File No. BPH-860707NQ) ARE DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] A total of six applications were originally included herein in the *HDO*, DA 88-781, released June 3, 1988, 53 Fed. Reg. 22569 (published June 16, 1988). Of those, two failed to file notices of appearance and were, accordingly, dismissed by the Presiding Judge. *See Order*, FCC 88M-2873, released September 2, 1988 (dismissing the application of Pinetop Partners, Inc.) and *Order*, FCC 88M-2946, released September 8, 1988 (dismissing the application of A BCD Broadcasting). Pursuant to an agreement which provides for dismissal of its application, a third applicant -- FM Flagstaff Limited Partnership -- requested dismissal of its application, *See* Joint Request of Approval of Agreement, submitted by FBP and FM Flagstaff Limited Partnership on January 13, 1989, and elected not to advance any direct case evidence herein, *see* Tr. 254-255, 363. That request has since been granted. *See Order* FCC 89M-314, released February 2, 1989.

[2] By *Memorandum Opinion and Order*, FCC 89M-2605, released August 11, 1988, the contingent environmental issue relative to Foundation was resolved in its favor.

[3] Foundation seeks to change the Commission's definition of integration so that proposals such as Foundation's -- where low-to-moderate income persons will set policy for a station -- will automatically be credited in the same manner as if traditional integration were proposed (Tr. 200, 213, 279).

[4] The appropriate calculation of FBP's interest in WDCW(FM) is to multiply Fellows' interest in FBP--50 percent--by his August, 1987, interest in the Sturgeon Bay Station--100 percent. *See The Reginald A. Fessenden Educational Fund, Inc.*, 59 RR 2d 1255 (Rev. Bd. 1985).

[5] Integration prosposals in the Paradise Valley case had to be filed on or before December 5, 1988.

[6] Ms. Zozaya's counsel argues that Ms. Zozaya's integration pledge in Paradise Valley is legally irrelevant, but that conviction is belied by Ms. Zozaya reducing her time commitment in Paradise Valley from 40 hours to 30 hours per week.

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BAY SPRINGS TELEPHONE
COMPANY, INC.

Petition for Waiver of Section
69.4(b) and Subparts B and C of
Part 69 of the Commission's Rules

ORDER

Adopted: May 11, 1989; Released: August 14, 1989

By the Chief, Common Carrier Bureau:

1. On March 21, 1989, Bay Springs Telephone Company, Inc. (Bay Springs) filed a petition requesting waiver of Section 69.4(b) and Subparts B and C of Part 69 of the Commission's Rules, 47 C.F.R. § 69.4, Part 69, Subparts B and C, in order to establish a separate rate element for an Interim NXX Translation Optional Feature. Bay Spring's petition is unopposed.

2. As described by Bay Springs, the Interim NXX Translation Optional Feature is an originating access service offering which uses trunk side switched access service to identify an interexchange carrier (IC) and then route calls to the IC based on its NXX code.[1] Bay Springs states that a separate rate element is necessary to ensure that costs unique to the Interim NXX Translation Optional Feature are recovered from the cost causer.[2] It explains that the Commission's Rules do not provide for assessment of a non-recurring charge that would apply to the initial order for the installation of the Interim NXX Translation Optional Feature with Feature Group C (FGC) switched access service and for each subsequent order received to add or change NXX translation codes. It states that this charge applies regardless of the time at which FGC Switched Access Service is installed. [3]

3. We find that Bay Springs has shown good cause for waiver of Section 69.4(b) and Subparts B and C of Part 69 of the Commission's Rules. We conclude that grant of its waiver request is consistent with Commission policy that access costs be recovered from the cost causer.

4. Accordingly, IT IS ORDERED that the petition for waiver of Section 69.4(b) and Subparts B and C of Part 69 of the Commission's Rules filed by Bay Springs Telephone Company, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Bay Springs Petition at 2.
[2] *Id.* at 5.
[3] *Id.* at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, — File No. I-T-C-89-084

Application for Authority to Operate Facilities in the Private Transatlantic Telecommunications Cable System for the Provision of Authorized Common Carrier Services to the United Kingdom, the Republic of Ireland and Bermuda and Points Beyond

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: August 3, 1989; Released: August 14, 1989

By the Chief, Common Carrier Bureau:

1. On March 24, 1989, US Sprint Communications Company Limited Partnership (US Sprint), pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, filed an application requesting authority to (a) operate three DS-3 facilities[1] [45 Megabits per second (Mb/s) circuits] in the Private Transatlantic Telecommunications Cable System (PTAT cable system) for the provision of its authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond;[2] and (b) acquire by lease and operate facilities as may be necessary to extend capacity in the PTAT cable system. [3]

2. US Sprint is a limited partnership organized and existing under the laws of the State of Delaware. US Sprint is a non-dominant carrier providing telecommunications services throughout the United States, including the U.S. Virgin Islands, Guam, Puerto Rico and to numerous international points pursuant to authority granted by the Commission. US Sprint is currently authorized to provide common carrier services between the United States and the countries to be served initially by the PTAT-1 cable.[4] Such services are provided over both satellite and submarine cable circuits.

3. The application was placed on public notice on March 24, 1989. In response to the notice, American Telegraph and Telephone Company (AT&T) filed comments. US Sprint filed reply comments, to which AT&T responded. Based on our review of the application and the pleadings, we grant the application before us and authorize US Sprint to operate three DS-3s in PTAT-1 to provide authorized common carrier services.

THE APPLICATION

4. US Sprint states that the facilities covered by its application will be used to supplement its existing facilities in the provision of authorized common carrier services it currently provides or which it may provide to each of the countries covered by this application and points beyond. US Sprint, through UTI, has been authorized to purchase the U.S.-half of the PTAT cable system.[5] By this application, US Sprint seeks to convert three DS-3 facilities in PTAT-1 from private to common carriage. US Sprint states that such conversion does not involve any additional costs to US Sprint which already will have acquired the facilities. US Sprint states that the circuit requirements set forth in the application, and supplemented by its reply comments, represent US Sprint's expected facilities needs in PTAT-1 for a three year period beginning in July 1989 when PTAT-1 will be placed in service. In Appendix A of its reply comments, US Sprint estimates the number of circuits it expects to utilize between the United States gateways and the overseas points covered by its application.

5. On the U.S. side, appropriate cable connecting facilities will extend the three DS-3s through the cable head landing point at Sea Girt, New Jersey, to terminals in the gateway cities of New York, New York and Philadelphia, Pennsylvania.

6. US Sprint will provide its authorized common carrier services to the United Kingdom in connection with the domestic system of Mercury Communications Limited ("Mercury"), the wholly-owned subsidiary of Cable and Wireless, plc ("C&W"), which is the owner of the foreign half of the PTAT cable system, or with other networks for the provision of services throughout the United Kingdom. US Sprint will provide its authorized common carrier services to Bermuda with C&W (Bermuda), Limited. US Sprint will provide its authorized common carrier services to Ireland with the national network of Bord Telecom Eirann ("Eirann"). In addition, US Sprint will extend its operations by suitable facilities to the borders of other countries or to the terminals of other international communications systems (including cable terminals and satellite earth stations) thereby enabling US Sprint's common carrier facilities in PTAT-1 to be used to provide services to points beyond the PTAT-1 terminal countries.

7. US Sprint states that the grant of its application will enhance the Commission's efforts to develop an effectively competitive international telecommunications market. US Sprint notes that in the U.S. domestic market, AT&T's market power in the provision of common carrier services has been diminished, in large part, because carriers like US Sprint have risked significant resources to build competing nationwide networks. US Sprint states that, as a result, AT&T's competitors no longer need to obtain substantial amounts of facilities from AT&T to provide service, and AT&T's power to control the growth of its competitors through the provision of facilities or the manipulation of its rate structure for such facilities is not as absolute as it once was. Moreover, US Sprint notes that in order to recover the investment in their networks, facility-based carriers must be able to attract significant numbers of customers. US Sprint states that this incentive, in turn, forces such carriers to design high-quality innovative services in order to attract customers to fill up their facilities. US Sprint concludes that such competitive efforts accrue to the benefit of the general public.

8. On the other hand, US Sprint argues that the current international market is different from the domestic market described above. US Sprint notes that AT&T still owns and controls the bulk of the United States half of international cable facilities.[6] Thus, US Sprint contends that given AT&T's substantial ownership interest in these cables, AT&T is in the position - and has the incentive - to limit the growth of its competitors in the provision of international telecommunications services. U.S. Sprint states that AT&T, as the controller of "bottleneck facilities," is in a position to delay, or perhaps decline outright, the transfer of circuits on an IRU basis to its international competitors.[7] Thus, US Sprint maintains that allowing it to utilize PTAT-1 for the carriage of common carrier traffic would be very helpful in promoting facility-based competition for international common carrier service, and, if the domestic experience is any guide, help to diminish AT&T's remaining dominance in the international telecommunications market.[8]

9. US Sprint adds that the domestic experience with facility-based competition to AT&T would also suggest that US Sprint's ability to use PTAT-1 for common carriage will provide the American public with more innovative services at lower costs. US Sprint recognizes that the Commission originally envisioned that the capacity in private cable systems offered on a non-common carrier basis would also result in the development of new and innovative service offerings to satisfy users with bulk capacity needs or special service requirements for international services. US Sprint notes, however, that the Commission did not preclude the use of PTAT-1 cable capacity for common carriage and in fact has authorized Allnet Communication Services, Inc. to provide common carrier services over PTAT-1.[9] US Sprint points out that it is not seeking to convert the entire PTAT cable system to common carrier service. It states that its request, if granted, would transfer only 11% of the cable capacity from private to common carriage, leaving approximately 89% of the capacity in PTAT-1 available to satisfy users who wish to obtain bulk capacity or have special service needs.

10. Finally, US Sprint contends that the grant of its application should not divert much, if any, traffic away from the common carrier facilities already authorized. It states that it will continue to use its current cable and satellite facilities for its provision of its common carrier traffic. US Sprint maintains that the capacity it requests from the PTAT-1 cable for common carriage will give US Sprint sufficient capacity to accommodate its projected growth in the international market[10] without the need to depend upon AT&T for such capacity.

II. THE PLEADINGS

a.) *AT&T Comments*

11. AT&T explains that the rationale of the pertinent Commission Orders indicates that the conversion of a portion of PTAT-1 capacity to common carriage would not affect the application of the Commission's policy - that common carriers are not obliged to use private international facilities - to PTAT-1. AT&T states that it therefore does not oppose US Sprint's transfer of a substantial portion of the PTAT-1 capacity from private to common carriage. However, AT&T submits that US Sprint's application fails to comply with the requirements of Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and that the Commission should defer consideration of the application until the deficiencies are remedied.

12. AT&T notes that Section 63.01 delineates the information that an applicant must submit to permit the Commission to make a public interest finding under Section 214 of the Communications Act. AT&T argues that US Sprint's application is deficient in two respects. First, AT&T states that US Sprint's application fails to adequately describe the facilities to be acquired, 47 C.F.R § 63.01(h), noting that the application fails to disclose the capacity proposed to be operated from New York and Philidelphia to each of the overseas terminals of PTAT-1. AT&T explains that this information is essential to permit other U.S. carriers who may wish to purchase PTAT-1 capacity in the future to determine how capacity in the cable system could be made available and how interconnection to their own domestic networks could be provided. Second, AT&T maintains that the application also fails to disclose the cost and complete contractual terms and conditions governing the use, operation, and maintenance of the PTAT-1 facilities US Sprint seeks to transfer to common carriage, 47 C.F.R. § 63.01(k)(3). AT&T states that the Construction and Maintenance Agreement does not contain such information.[11] AT&T argues that US Sprint cannot be held to a different standard than that applicable to other common carriers acquiring capacity from common carrier facilities. It concludes that as long as there are regulatory standards in force, they must be applied uniformly.

13. Moreover, AT&T argues that US Sprint should be required to disclose the cost to it of acquiring ownership of facilities in PTAT-1 for common carriage - both aggregate and segment costs.[12] AT&T contends that, without disclosure of US Sprint's acquisition costs, the Commission will not be in a position to evaluate whether the common carrier investment in the facilities is in the public interest or to monitor whether any future Indefeasible Right of User (IRU) sales from US Sprint's common carrier capacity to other United States International Service Carriers (USISCs) are at net book cost as required by Commission policy,[13] or are in accordance with such other policy as the Commission may establish regarding conveyances among U.S. carriers.[14]

14. Additionally, AT&T states that US Sprint is incorrect in its assertion that AT&T has the ability and incentive, by virtue of AT&T's substantial interests in international cable systems, to engage in anticompetitive conduct in making available to other USISCs common carrier capacity in international circuits.[15] AT&T states that US Sprint's assertion ignores the fact that AT&T, unlike the holder of a private system, does not unilaterally control any facility. It explains that construction of international facilities for the provision of common carrier international services requires planning and development in conjunction with other USISCs and numerous foreign correspondents. AT&T adds that the use of such facilities is determined by agreement between the USISCs and the foreign correspondents, which jointly provide services based on their forecasted service needs. AT&T explains that upon request of a foreign correspondent, AT&T would convey capacity, subject to availablity, in such facility to another USISC with which the correspondent wished to provide joint services. AT&T notes, for example, that in TAT-7 alone AT&T has transferred 619 half- circuits to various USISCs on an IRU basis since

that system's Ready for Service date. AT&T contends that US Sprint will hold the capacity in PTAT-1 free of any inter-carrier restrictions regarding transfer.[16] Moreover, AT&T notes that US Sprint will be in a position of controlling an international facility that is over 40 percent larger than the combined capacity of all existing transatlantic common carrier cable systems. AT&T argues that such a position creates a potential for abuse by US Sprint in its provision of PTAT-1 common carrier capacity to other USISCs.[17]

15. Finally, AT&T argues that US Sprint's investment in PTAT-1 must be at its own risk without any guarantee of traffic from other USISCs. AT&T notes that pertinent Commission orders indicate that a common carrier's acquisition of facilities in a private international cable system for common carriage should not render the policy inapplicable to the particular private system. AT&T states that the decision to use any portion of PTAT-1 must be made jointly between a USISC and its correspondent based on their market needs. AT&T states that reaffirming this policy in the context of this proceeding would advance the Commission's objective of increasing user alternatives through intramodal competition between private cables and common carrier cables.

b.) Reply of US Sprint

16. US Sprint states that AT&T's comments make no claim that any of the purported "deficiencies" are sufficiently serious so as to have any meaningful effect on the Commission's public interest determination. US Sprint adds that nor does AT&T claim that its own interest would be harmed by these "deficiencies." It emphasizes that AT&T's comments make explicit that AT&T opposes neither US Sprint's acquisition of PSI and PTAT-1 nor the transfer of a substantial portion of the PTAT-1 capacity from private to common carriage.

17. US Sprint states that it has adequately described the facilities to be acquired. US Sprint adds that in considering any possibility of deferral, it is important to consider the purpose for which this information is sought under Section 63.01.[18] In this context, US Sprint maintains that deferral would be warranted only where the omission of information required under Section 63.01 is sufficiently serious as to be of decisional consequence in the Commission's determination of the public interest.

18. US Sprint argues that the application at issue here obviously does not present a "typical" Section 214 situation where a rate base regulated carrier is seeking to construct or purchase new capacity and where the Commission must ensure that such facilities are genuinely required to meet demand for service so that captive ratepayers will not be disadvantaged by having their rates raised to pay for useless capacity. It notes that it is not rate base regulated, has no market power, and is, therefore, incapable of burdening customers with the cost of underutilizing facilities. US Sprint adds that because it is a non-dominant carrier, it is, by definition, unable to raise its rates above those set by the marketplace.

19. Furthermore, US Sprint notes that, as a non-dominant carrier, it has been largely excused by the Commission from filing Section 214 applications. A notable exception is that US Sprint is required to file a Section 214 application to transfer or otherwise acquire private cable and satellite capacity which it seeks to use to provide common carrier service to already authorized countries. US Sprint notes that the Commission found that the continuation of the Section 214 application process is necessary in such instances so that the Commission would have an opportunity to consider the potential effect of traffic diversion from existing or planned satellite or cable common carrier facilities. US Sprint notes that in the event that common carriers seek to divert major amounts of traffic from existing transmission facilities the Commission would then be in a position to determine whether significant economic harm to common carriers owning and using existing facilties would occur and would be contrary to the public interest.

20. US Sprint states that nowhere in its comments does AT&T even so much as hint that it or any other carrier would be harmed by the transfer of the three DS-3 facilities in PTAT-1 from private to common carriage. US Sprint claims that AT&T has not suggested that the additional information it seeks is somehow necessary to enable the Commission to decided the core public interest issue presented by US Sprint's Application. It states that AT&T does not really explain what purpose the additional level of specificity insisted upon could be expected to serve.[19]

21. Despite US Sprint's firm belief that the additional information sought by AT&T is unnecessary, US Sprint has attached to its reply its best estimate of the number of circuits it expects to utilize between the United States gateways and overseas points covered by its application over the next three years.[20]

22. US Sprint also argues that it has provided the Commission with the required cost, terms and conditions necessary for review of its application. US Sprint states that the Section cited by AT&T -Section 63.01(k)(3) - is inapplicable to US Sprint's requested conversion of PTAT-1 facilities from private to common carriage. It contends that Section 63.01(k)(3) applies only if the proposed facilities are to be purchased. US Sprint states that its application explains that it will already own the facilities in question at the time of the conversion. US Sprint maintains that Section 63.01(k)(4) is applicable in the present case, where the facilities are to be acquired or operated other than by lease or purchase. Section 63.01(k)(4) only requires an applicant to provide a detailed description of the facilities involved; the terms of the contract or other arrangement relating to such acquisition or operation; added equipment cost; and each other added cost to the applicant. US Sprint maintains that it has fully complied with the requirements of this Section.

23. Additionally, US Sprint states that AT&T does not explain how the price UTI paid for the stock of PSI would help the Commission in its public interest determination here. US Sprint argues that since the facilities at issue here represent only a fraction of the PTAT cable system, US Sprint would have to subject the purchase price to a series of allocations to derive their cost. US Sprint contends that because it is a non-dominant carrier, US Sprint is not subject to the Uniform System of Accounting (USOA), or the cost allocation rules developed by the Commission in CC Docket No. 86-111, and further, the Commission would have no way to judge whether such allocations are reasonable.

24. US Sprint states that it is equally unclear what purpose would be served if US Sprint were to supply information on the cost of the facility. US Sprint argues that such costs are not needed to determine a revenue requirement to which a return element should be added, since as a non-dominant carrier, it is not subject to rate of

return regulation. US Sprint explains that this is not a situation where a dominant carrier seeks to construct or otherwise acquire facilities and the Commission uses the Section 214 process to ensure that such facilities are necessary and the costs are prudently incurred in order to protect ratepayers who will ultimately pay for those facilties. It notes that here it bears all the risk associated with its acquisition of the PTAT cable system. If the venture fails, US Sprint and its owners, not its customers, will suffer the loss.

25. US Sprint disagrees with AT&T that disclosure of US Sprint's acquisition costs of the PTAT cable system is necessary in order to monitor any future IRU sales from US Sprint's common carrier capacity to other users. US Sprint states that it does not plan to sell IRUs in the capacity it is seeking to convert from private to common carriage;[21] such capacity will be used to accomodate US Sprint's own common carrier needs over the next three years. Although it is willing to convey portions of the remaining private capacity in PTAT to other carriers, even AT&T concedes that the Commission's policy that IRUs in TAT cables be purchased at net book cost does not apply to such conveyances.[22] Consequently, US Sprint contends that the IRU/net book cost issue is clearly irrelevant to US Sprint's Section 214 application here.

c.) Reply Comments of AT & T

26. AT&T states that the Commission has ruled that non-dominant international carriers, such as US Sprint, must comply with the requirements of Section 214 of the Communications Act when they acquire capacity in private facilities for common carrier services because such compliance is necessary for the Commission's long-range facilities planning responsibility. AT&T notes that as recently as May 22, 1989, the Commission reaffirmed that all international carriers seeking to acquire such capacity must provide the information required by the Commission's rules to be contained in a Section 214 application.[23] It concludes that there is, therefore, no question that US Sprint is obliged to comply with Section 63.01 of the Commission's Rules in this proceeding.

27. AT&T contends that US Sprint's application is still deficient under Section 63.01 of the Commission's Rules in its failure to describe adequately the facilities to be acquired and to disclose the cost and the complete contractual arrangements relating to the acquisition. AT&T states that US Sprint's reply comments purport to describe the facilities to be acquired by providing a three-year circuit forecast to the three overseas points covered by its application. AT&T argues that this description still fails to disclose the U.S. gateway from which the circuits will originate. AT&T states that US Sprint concedes that the Commission did not possess a full record of all the terms and conditions governing the use, operation and maintenance of PTAT-1. It maintains that the thrust of US Sprint's reply is that the incomplete information it supplied should suffice, given the fact that it is not rate of return regulated[24] and its perception of the Commission's limited role regarding private cable systems.

28. AT&T further states that knowing the price and other terms at which a carrier will acquire private system facilities would be extremely useful to the Commission in evaluating whether the diversion of traffic from common carrier systems to private systems is in the public interest. AT&T notes that US Sprint's Reply acknowledges that the Commission wants the opportunity to make such evaluations. Moreover, AT&T claims that having complete information will enable the Commission to assess the competitive implications of any disparity between the price paid by US Sprint for common carrier capacity in PTAT-1 and the prices it charges its U.S. competitors for such capacity. AT&T argues that an assessment of this kind could become necessary because of US Sprint's unique position as sole U.S. operator of an international facility that is over 40 percent larger than the combined capacity of all existing transatlantic cable systems.

29. AT&T notes that US Sprint seeks to avoid the disclosure of costs required by Section 63.01 by maintaining there are none. However, AT&T points out that the application makes clear that US Sprint will be acquiring the U.S. half of PTAT-1 with the intention of using a portion of those facilities for common carrier operations. AT&T states that under these circumstances, it is mere rhetorical sleight of hand for US Sprint to assert that no costs will be incurred in acquiring the common carrier portion.

30. AT&T adds that as a further justification for omitting cost information, US Sprint explains that in order to submit such information it would have to subject its total PTAT-1 purchase price to a series of cost allocations to derive the common carrier cost, and that the Commission would have no way to judge the reasonableness of the allocation because US Sprint is not subject to the USOA or the Commission's cost allocation rules. AT&T submits that if US Sprint adequately explains how it made the allocation, the Commission will be able to determine whether the approach was reasonable.

31. AT&T submits in conclusion that the Commission should defer consideration of the Application until US Sprint fully complies with the requirements of Section 63.01 of the Commission's Rules.

III. DISCUSSION

32. In 1985, the Commission adopted its private submarine cable policy to promote competition in the provision of international facilities.[25] It determined that an increase in competition in the provision of facilities would stimulate technology and service development to the benefit of international telecommunications users. The Commission granted PSI, formerly Tel-Optik Ltd., a cable landing license to land and operate the PTAT cable system between the United States and the United Kingdom and to sell or lease capacity in the PTAT cable system on a non-common carrier basis.[26] The Commission did not preclude the possibility that common carriers would be permitted to acquire capacity in the PTAT cable system for the provision of their services. The Commission stated that it would require carriers interested in acquiring capacity in PTAT to seek authority under Section 214 of the Communications Act.[27] However, the Commission emphasized that private cable systems shall succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of any system. As noted above, the Common Carrier Bureau has recently authorized US Sprint to acquire PSI pursuant to the Commission's private submarine cable policy.[28]

33. As a general matter, we find that the grant of US Sprint's application will promote the policy aims of the Commission's *Private Submarine Cable Decision* and, therefore, will be in the public interest. US Sprint's use of a portion of the PTAT-1 cable system for the provision of

common carrier services will enhance the viability and credibility of PTAT-1 as an alternative to common carrier facilities. Such use will facilitate the introduction of competition in the provision of international transmission facilities. The Commission has made it clear that the introduction of facilities-based competition into a market is a significant and positive step that is beneficial to the public.[29] Such competition will give service providers greater choice in selecting facilities and thus enable them to maintain, or improve and enhance, the economical and efficient provision of their services to the public. The opportunity to choose between facilities will further enable service providers to be more responsive to customer needs in terms of price, service quality, and service availability. We find that US Sprint's proposal to convert three DS-3s to common carriage will result in these type of benefits to US Sprint's customers.

34. Furthermore, we find that US Sprint has provided the information necessary for us to grant its application. The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's rules to be contained in a Section 214 application.[30] Commission rules regarding the information required in a Section 214 application are found in 47 C.F.R. § 63.01.

35. AT&T contends that US Sprint has failed to provide some of the information required under Section 63.01 of the Commission's rules. Specifically, AT&T argues that US Sprint's application fails to adequately describe the facilities to be acquired, and fails to disclose the cost and complete contractual terms and conditions governing the use, operation, and maintenance of the PTAT-1 facilities US Sprint seeks to transfer to common carriage.

36. We find that US Sprint has submitted the information required under Section 63.01 describing the facilities for which authority is requested. US Sprint seeks authority to convert three DS-3s in PTAT-1 to common carriage. It also requests authority to extend the three DS-3s through appropriate connecting facilities from the U.S. cablehead in Sea Girt, New Jersey to its gateway cities in the New York City and Philadelphia areas. Further, in its reply to AT&T's comment, US Sprint provides a table with estimates of the circuits needed over PTAT in 64/Kbit equivalent circuits to the overseas points covered by its application.[31] We disagree with AT&T that any additional descriptive information is necessary. AT&T's contention - that additional information is required to permit other U.S. carriers, who may wish to acquire PTAT-1 capacity in the future, to determine how capacity could be made available, and how interconnection to their own domestic networks could be provided - is without merit. Such additional descriptive information does not further the purpose of this application before the Commission. We are confident that the U.S. licensee will provide any and all information desired by carriers who may wish to acquire PTAT capacity. Failure to do so could result in the loss of potential customers and the loss of opportunity to recoup a significant investment. Taken together, the information provided by US Sprint is typical for Section 214 applications, and sufficient for our purpose in this case.[32]

37. We further find that US Sprint has complied with the Commission's rules as to the submission of cost information. We agree with US Sprint that Section 63.01(k)(4) applies to the facts in the present case. US Sprint will already own the facilities to be converted to common carriage through its ownership of PSI. Although PSI will continue to exist as the licensee of the cable, it is our understanding that US Sprint, not PSI, will control and operate the U.S.-half of the PTAT cable system. In our review of the documents presented in this proceeding, we find nothing to indicate that US Sprint will enter into any lease or purchase arrangement with PSI to convert the three DS-3s to common carriage.[33] Thus, under Section 63.01(k)(4), "[i]f facilities are to be acquired or operated other than by lease or purchase (the applicant must provide) a detailed description of the facilities involved; the terms of the contract or other arrangement relating to such acquisition or operation; added equipment costs; and each other added cost to the applicant."

38. In this context, we have already determined above that US Sprint has provided the Commission with a detailed description of the facilities it seeks to transfer to common carriage. Further, US Sprint has filed with us the requisite documents regarding the complete contractual terms and conditions governing the use, operation and maintenance of the PTAT-1 facilities.[34] Finally, US Sprint maintains that it incurs no additional costs in the transfer of the three DS-3s covered by this application. We find, therefore, that US Sprint has also submitted the requisite information under Section 63.01(k)(4) of the Commission's rules.

39. We disagree with AT&T that the submission of cost information is otherwise required here because US Sprint is seeking authority to use a private cable for common carriage. AT&T presents two arguments: (1) that such information would be useful for the Commission in evaluating whether the diversion of traffic from common carrier systems to private systems is in the public interest; and (2) that such information would enable the Commission to assess the competitive implications of any disparity between the price paid by US Sprint for common carrier capacity in PTAT-1 and the prices it charges other U.S. competitors for such capacity.

40. We believe that cost information may be useful in cases where a diversion of traffic concern is raised. However, as discussed in paragraph 46 below, no such concern is raised by the application now before us. Should an application raise a traffic diversion concern, the Commission retains sufficient authority to request any additional information, including cost information.

41. On the other hand, we see no basis to require cost information for the purpose of considering the competitive implications of any disparity in the PTAT-1 prices paid by US Sprint and the prices paid by other U.S. carriers. Simply put, there is no need for the Commission to engage in any such analysis. PTAT-1 is a private cable, and capacity will be made available to users on a non-common carrier basis. The Commission will not regulate the prices charged for such capacity - the market will do so. Should US Sprint charge exorbitant prices to other U.S. carriers for capacity in PTAT-1, it will force those carriers to seek transmission capacity from other sources, thus placing US Sprint's sizable investment in PTAT-1 at risk. We see no need to require cost information for this purpose suggested by AT&T.

42. Finally, we agree with US Sprint that Commission review of cost information serves no useful purpose where the applicant is a non-dominant carrier, not rate base regulated, has no market power, and is therefore incapable of burdening customers with the cost of underutilizing

facilities. Any attempt by a non-dominant carrier that, by definition, has no market power, to raise its rates above those set by the marketplace because of overinvestment may result in the loss of potential customers. We believe that we can rely upon the marketplace to regulate US Sprint's common carrier investment decisions. Review of cost information regarding US Sprint's investment in the three DS-3s would thus appear to be of little, if any, decisional significance in the present case.

43. In a related matter, certain aspects of the contractual arrangements between the parties raise Commission policy concerns. There is a provision in an agreement between UTI and C&W relating to the stock purchase of PSI, and the development, construction, installation, ownership, operation, and maintenance of PTAT, that states that "C&W hereby agrees that it shall use US Sprint's domestic fiber facilities for all traffic transiting the United States which uses the C&W assets." Such language creates an exclusive arrangement between the contracting parties for the provision of domestic traffic within the United States. It therefore violates the condition of the cable landing license for the PTAT-1 and PTAT-2 cables which provides:

> The Licensee or any persons or companies controlling it or controlled by it do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or *to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any person or companies controlling them or controlled by them are parties.*[35][Emphasis added.]

As a result, we condition the authorization of this Section 214 application upon the removal of the specific provision mentioned above.

44. Furthermore, we note that business arrangements entered into by C&W and US Sprint envision joint global network, marketing and sales activities. These arrangements suggest the potential for the creation of exclusive arrangements between C&W and US Sprint. While we need not reject these arrangements on their face, we will remind US Sprint that exclusive arrangements with correspondents have long been held to be contrary to Commission policy. In addition to the condition quoted above which appears in the cable landing license for the PTAT-1 and PTAT-2 cables, other submarine cables have similar prohibitions. We would observe that the Commission has placed similar prohibitions against exclusive contracts with correspondents in other forms of authorizations as well.[36]

45. Finally, the Commission stated in the *Clarification Order* that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to the application.[37] However, the Commission stated that it did not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us."[38]

46. The circumstances of US Sprint's application do not raise an economic impact issue. US Sprint states that the private cable capacity that it seeks to convert for common carriage will be used to supplement, not divert, its existing traffic. US Sprint will continue to use its current cable and satellite facilities for the provision of common carrier traffic. Moreover, AT&T does not assert that any adverse economic impact would result from US Sprint's use of the three DS-3s for common carriage. Therefore, we find that the factors presented in this case do not warrant consideration of such an issue. We further conclude that the conversion of the three DS-3s to common carriage is consistent with Commission policy statements concerning the use of private submarine cable systems for the provision of common carrier services.

47. Upon consideration of the application and the pleadings filed in response thereto, we find that the authorization of the requested facilities would serve the public interest.

48. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act, as amended, that the application, File No. I-T-C-89-084, of US Sprint is GRANTED, subject to the following terms, conditions, limitations. US Sprint is authorized to:

> (a) operate three DS-3 facilities in the Private Transatlantic Telecommunications Cable (PTAT-1) for the provision of its authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond; and
>
> (b) extend these facilities as may be necessary through appropriate connecting facilities from the U.S. cablehead in Sea Girt, New Jersey to its gateways in the New York City and Philadelphia areas.

49. IT IS FURTHER ORDERED that this authorization is conditioned upon US Sprint's completion of its closing to acquire control of PSI, consistent with the terms and conditions of the *Transfer of Control Decision*, 4 FCC Rcd 5077 (Com. Car. Bur. 1989).

50. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§ 34-39).

51. IT IS FURTHER ORDERED that US Sprint shall cause to have deleted from the contract between UTI and C&W, referenced in paragraph 43 herein, that provision which states "C&W hereby agrees that it shall use US Sprint's domestic fiber facilities for all traffic transiting the United States which uses the C&W assets."

52. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petition for reconsideration under Section 1.106 or applications

for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] This capacity is equivilant to 1,890 DS-0 circuits [64 Kilobits per second (Kb/s) circuits], or about 11 percent of the total PTAT-1 capacity.

[2] On March 9, 1989, United Telecommunications, Inc. (UTI), Private Transatlantic Telecommunications Systems, Inc. (PSI) and the Trustees of PSI entered into a Stock Purchase Agreement under which UTI would purchase the stock of PSI in its entirety. UTI, which holds an 80.1 percent interest in US Sprint has assigned its rights and obligations under the Stock Purchase Agreement to US Sprint.

[3] US Sprint also stated that it would grant capacity in such facilities to foreign administrations on an Indefeasible Right of User (IRU) basis. However, in a June 29, 1989 letter to the Commission, US Sprint states that it will use the facilities referenced in its application to "accommodate its own common carrier needs over the next three years and does not plan to sell Indefeasible Right of User (IRUs) in the requested facilities to either U.S. carriers or foreign carriers. US Sprint will interconnect the facilities to matching facilities of the foreign entities participating in the PTAT cable system in order to provide common carrier services between the United States and the United Kingdom, Ireland, Bermuda and points beyond. To the extent that the quoted language (in) US Sprint's application implies otherwise, it should be disregarded." *See* Letter from Michael B. Fingerhut, General Regulatory Attorney, US Sprint, to the Deputy Assistant Bureau Chief/International, Common Carrier Bureau (June 29, 1989).

[4] The PTAT cable system consists of two transatlantic fiber optic submarine cables and dedicated fiber optic terrestrial facilities from the landing points to the gateway cities listed below. The first cable, PTAT-1, is scheduled to become operational in mid-1989. In the United States, PTAT-1 will extend from terminals in the gateway cities of New York, New York and Philadelphia, Pennsylvania to the landing point at Sea Girt, which is located in the municipality of Manasquan, New Jersey. In the United Kingdom, the cable will land at Brean near Weston-Super-Mare, Somerset and extend to the gateway terminal at Bracknell, west of London. The PTAT-1 cable also consists of spurs to Bermuda and the Republic of Ireland. The Bermuda spur will land at Devonshire Bay, Bermuda; the Ireland spur will land at Courtmacsherry Bay and connect to the terminal located at Ballinspittle, County Cork. *See Private Transatlantic Telecommunications System, Inc.*, File No. SCL-89-001-TC, 4 FCC Rcd 5077 (Com. Car. Bur. 1989)(hereinafter *Transfer of Control Decision).*

[5] *Id.* Under the terms of the transfer of control, US Sprint is buying PSI, the licensee and owner of the cable. On June 14, 1989, the Common Carrier Bureau approved the transfer of control. *See Transfer of Control Decision, supra* note 4.

[6] US Sprint notes, for example, that AT&T's share of the minimum assignable units of ownership (MAUOs) in the U.S. half of the TAT-8 cable is approximately 73%. *See American Telephone and Telegraph Co., et. al.*, (TAT-8 Order), 98 FCC 2d 440, 446 (1984). AT&T's ownership share in the main cable segment of TAT-9 accounts for approximately 75% of the combined ownership shares of all U.S. international service carriers participating in that system. *See American Telephone and Telegraph Co., et. al.* (TAT-9 Order), 4 FCC Rcd 1129 (Com. Car. Bur. 1988).

[7] US Sprint makes no claim that AT&T has, in fact, behaved anticompetitively. Rather, it only points out that AT&T's continued control of bottleneck facilities is inimical to the growth of full competition in the international market.

[8] US Sprint adds that it was not an original owner in the TAT-8 cable system and only recently was able to secure 210 of AT&T's circuits in TAT-8. US Sprint may also secure some of the circuits owned by Western Union through its acquisition of ITT World Communications. US Sprint emphasizes, however, that the TAT-8 circuits it will obtain are not sufficient to accommodate US Sprint's current needs for fiber-optic transatlantic cable facilities.

[9] Allnet Communications Services, Inc., File No. I-T-C-87-113, 2 FCC Rcd 6633 (Com. Car. Bur. 1987).

[10] US Sprint's Application contains an Appendix setting forth its demand projection over the next three years. *See* Appendix III.

[11] AT&T explains that Section 63.01(k)(3) of the Commission's rules requires either a complete description of the contractual arrangements relating to the sale of facilities or a copy of the documentation embodying such arrangements. AT&T adds that the most recent C&MA does not contain provision for the construction of the Ireland segment or the extension to Philidelphia. AT&T believes that US Sprint should be required to file, as part of the present application, a copy of the current C&MA covering construction of PTAT-1 as presently configured.

[12] For example, AT&T contends that US Sprint should disclose the cost of the U.S.-U.K. segment; the U.S.-Bermuda segment; and the extension facilities to the gateway cities. AT&T adds that US Sprint should indicate whether multiplexing costs are included in the cost information it provides.

[13] *See* Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers, CC Docket No. 87-45, 2 FCC Rcd 1465 (1987). The Commission's net-book cost policy regulates the price at which a U.S. carrier can convey or acquire capital interests in overseas facilities.

[14] AT&T notes that in CC Docket No. 87-45, the Commission proposed to reevaluate its policy requiring that conveyances of capital interests in international facilities be priced at net-book cost, while remaining committed to protecting other entrants from excessive prices on overseas circuits. AT&T submits that application of the Commission's present or future IRU policy only to conveyances from common carrier facilities and and not to conveyances of capacity for common carrier use from private systems would be unfair and would impede the development of intramodal competition between common carrier facilities and private facilities.

[15] Furthermore, AT&T states that US Sprint incorrectly states that AT&T holds 73 percent of the assigned TAT-8 capacity. In fact, AT&T maintains that its current jointly assigned TAT-8 ownership capacity, expressed as a percentage ratio of its capacity assignments in the TAT-8 C&MA to the assignment of all

Western owners, has decreased from 73 percent to approximately 68 percent through changes in ownership reassignments prior to TAT-8's Ready for Service date. In addition, AT&T states that its TAT-8 capacity has been further reduced by agreement to convey IRUs to other Western entities, including 210 Minimum Assignable Units of Ownership to US Sprint. AT&T maintains that this further reduces AT&T's capacity for use with its correspondents to approximately 58 percent. AT&T concludes that ownership shares, therefore, are an inadequate indicator of control because many USISCs purchase IRUs from AT&T at, or after, the Ready for Service date of a facility. AT&T states that while AT&T's *ownership* interest may remain constant, the purchase of IRUs by other USISCs diminishes AT&T's available capacity.

[16] AT&T notes that the Commission traditionally retains the authority to reallocate capacity in common carrier international facilities among U.S. carriers. AT&T states that there is no such oversight by the Commission to reallocate capacity in private systems.

[17] AT&T adds that it does not wish to advocate in its comments that the Commission impose specific terms and conditions on the conveyance of future private PTAT-1 capacity.

[18] US Sprint adds that it recognizes that point-to-point capacity is frequently, even typically, provided by Section 214 applicants. Such information, according to US Sprint, is plainly far more relevant to the public interest where facilities are being constructed or purchased by a dominant carrier than would be true in a situation, such as the present, where facilities are simply being transferred from private to common carriage.

[19] US Sprint notes that AT&T states that the further information it seeks is somehow "essential" to permit other carriers seeking capacity in PTAT-1 "to determine how capacity in the cable system could be made available and how interconnection to their own domestic networks could be provided." US Sprint states that AT&T does not explain, however, why such information is essential. US Sprint states that, contrary to AT&T's argument, there would appear to be no reason why customers - including carriers - could not obtain capacity which has been assigned or which remains available for common carriage. US Sprint states that one can purchase an item from a vendor without knowing the limits of the vendor's stock. The three DS-3s cannot accommodate large scale leases to other carriers or the conveyance of IRUs. US Sprint claims that such transactions will be accommodated through the availability of other PTAT capacity.

[20] US Sprint reply, at Appendix A. US Sprint adds that because of the difficulty in forecasting circuit requirements in the volatile international marketplace, US Sprint respectfully requests that such estimates not be utilized by the Commission to limit any US Sprint authorization.

[21] *See also supra* note 3.

[22] US Sprint notes that in the case of AT&T's Section 214 applications to construct and operate transatlantic cables, AT&T has argued that questions relating to the IRU/net book cost issue are appropriately considered in CC Docket No. 87-45, and not in the context of a Section 214 application (citing Reply Comments of Joint Applicants, In the Matter of AT&T *et al.* (TAT-9 Order), File No. I-T-C-88-181 (filed September 27, 1988)).

[23] Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989)(hereinafter *Clarification Order).*

[24] AT&T states that, taking US Sprint's argument to its logical conclusion, AT&T would also be exempt from the cost showing requirements of Section 63.01 in view of the Commission's adoption of a "price caps" system of regulating AT&T. *See Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rule Making, CC Docket No. 87-313, 4 FCC Rcd 2879 (1989).

[25] In the matter of Tel-Optik, Limited, 100 FCC 2d 1033 (1985)(hereinafter *Private Submarine Cable Decision).*

[26] Cable Landing License, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, Mimeo No. 4618 (released May 17, 1985).

[27] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985).

[28] Transfer of Control Decision, *supra* note 4.

[29] *See also* In the Matter of Establishment of Satellite Systems Providing International Communications, Report and Order, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985)(hereinafter *Separate Satellite Systems Decision).*

[30] Clarification Order, 4 FCC Rcd at 4455.

[31] *See* Appendix, Reply of US Sprint Communications Company Limited Partnership, May 16, 1989.

[32] In its reply comments, AT&T asserts that US Sprint has still failed to indicate from which United States gateway the PTAT-1 circuits US Sprint proposes to use for common carrier services will originate. We would observe that we do not require this level of detail from applicants for authority to acquire and operate capacity in common carrier submarine cable systems. Typically, authority to acquire United States connecting facilities for common carrier submarine cables is granted in the form of permitting the carriers to acquire the appropriate connecting facilities between the United States cable terminal and their respective operating offices. *See American Telephone and Telegraph Co., et al., (TAT - 9 Order)* 4 FCC Rcd 1129, 1133 (1988); *American Telephone and Telegraph Co., et al.,* (TAT-8 Ord er), 98 FCC 2d 440, 471 (1984). AT&T has not provided a reason for holding US Sprint to a more rigorous standard here.

[33] *See* Transfer of Control Decision, *supra* note 4.

[34] We note here that US Sprint has requested confidential treatment of some of these documents.

[35] Cable Landing License, FCC File Nos. I-S-C-L-84-002, and I-S-C-L-84-003, Mimeo No. 4618 (released May 17, 1984).

[36] For example, the Commission has for many years included the following condition in licenses for high frequency, international fixed, point-to-point telephone and telegraph stations:

> This license is granted upon condition that the licensee shall not operate under or enter into any contract, arrangement, or understanding with any foreign carrier or administration, which might prevent or hamper the establishment or unrestricted operation by such foreign carrier or administration of circuits with any other United States carrier, or the transmission of unrouted traffic of all classes over such circuits operated with any other United States carrier.

See Station File WMA 25, License File No. 30042-C3-R-75.

[37] Clarification Order, 4 FCC Rcd at 4456.

[38] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Recreational Marine Association, Inc.
request for waiver of Section 80.453
of the Rules.

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1989; Released: August 14, 1989

By Chief, Private Radio Bureau:

I. INTRODUCTION

1. Recreational Marine Association, Inc. (Association), licensee of very high frequency (VHF) public coast station WHU643, has requested a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to serve a limited number (not more than fifty) of vehicles on land on a secondary basis. This action grants the requested waiver.

II. BACKGROUND

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. In deciding not to adopt such general rules, the Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. The Commission stated: "The comments point out that maritime frequencies in many areas of the country are already extremely congested. In other areas of the country, however, lakes and rivers freeze over and the seasonal factors greatly affect capacity." *Report and Order* at 1312. Having decided not to adopt general rules, the Commission nevertheless recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to or derogation of maritime communications." *Report and Order* at 1313. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has granted two such waivers to date. *See In the Matter of Answer Exchange, Inc.*, 3 FCC Rcd 633 (1988). In *Answer Exchange* the Commission based the waivers on the fact that each station had limited marine traffic which was highly variable in terms of peak usage. The Commission allowed land mobile service to be offered to a very limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

III. DISCUSSION

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. In support of its request, the Association indicates that it will provide service only to a limited number of vehicles, a maximum of 50. It states that service will be provided on a basis strictly secondary to service to ships and then only during periods when there is limited or no maritime traffic. Further the Association states it will terminate land vehicle communications if the channel is needed for a ship. The station serves Lake Lewisville, Texas. Its traffic is primarily from recreational boats and largely occurs on weekends.

4. Under these highly restricted circumstances, we are waiving the rules to permit the Association to provide subsidiary service to the limited number of land vehicles requested. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by the Association must be type accepted for use in the Maritime Services (Part 80), the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22) and must be capable of operating only on the maritime public correspondence channels authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any channel other than those authorized for station WHU643. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rule Making* (*NPRM*) in PR Docket No. 86-2, 51 Fed. Reg. 4552 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land vehicles that utilize a public coast station's excess capacity operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' communications since enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licensees for each vehicle. Therefore, the license of the Association will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

IV. CONCLUSION

7. In view of the above, IT IS ORDERED that the requests for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license WHU643 submitted by the Recreational Marine Association, Inc. to serve vehicles, on a secondary basis, IS GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Revisions to Tariff F.C.C. No. 12

Transmittal Nos. 1649 and 1650

Custom-Designed Integrated Services

ORDER

Adopted: August 3, 1989; **Released: August 4, 1989**

By the Chief, Common Carrier Bureau:

1. These transmittals would establish two integrated service packages, Virtual Telecommunications Network Service (VTNS) Options VI and VII, to be provided under AT&T's Tariff 12. The two transmittals were filed simultaneously on June 16, 1989, and are scheduled to become effective on August 7, 1989. Petitions to reject or suspend and investigate the provisions were filed by the Independent Data Communications Manufacturers Association, Inc. (IDCMA), MCI Telecommunications Corporation (MCI), US Sprint Communications Company Limited Partnership (Sprint), and Williams Telecommunications Group, Inc. (Williams).

2. VTNS Option VI provides service in the United States, Puerto Rico, and the Virgin Islands, with calling capabilities defined by quantities of ports, port access telephone numbers, and voice and data transmission capabilities (VTCs and DTCs). The initial network configuration includes 1,356 measured remote ports and 55 VTCs, as well as 146 DTCs; these numbers may not be reduced below 85 percent of these levels. The original rates are stabilized for a four-year term. Option VI generally reflects the rate structure and elements established for previous VTNS configurations, though employing only one port type and initiating the VTC element.

3. VTNS Option VII provides service in the same jurisdictions as VTNS Option VI, but is considerably larger, initially providing 2,050 measured ports, 12,279 measured remote ports, 2,054 DTCs, and a single VTC. Reductions from the initial configuration are limited to 70 percent of ports and 50 percent of DTCs, and the rates are stabilized for five years. The basic flat-rated monthly charge is $2.45 million, and the minimum annual charge $59.86 million. Measured charges are applied under three rate schedules, each with three time-of-day periods and mileage bands consistent with Tariff No. 1; staged volume discounts up to a maximum of 20 percent are applied to measured charges. The general regulations for VTNS Option VII are the same as applied to Options I through VI.

4. IDCMA in its consolidated petition states that the only new feature in the subject options is the Voice Transmission Capability (VTC). Inferring that VTCs use private line facilities in some way because AT&T lists an access component charge for changes to this element, IDCMA contends the tariff definition could describe a simple telephone call or a high capacity DS-3 circuit, and asserts that this vagueness only adds to the difficulty of customers or integrated service providers attempting to determine whether they are "similarly situated." IDCMA also notes that Option VII apparently represents a renegotiation of General Electric's original arrangement under Tariff 12, and contends the relatively low installation charge and significant cross-elastic effects on AT&T's other services from Option VII belie the Commission's unlike service conclusion in the *April 18 Order*.

5. MCI states that revisions described in Transmittal 1649 contain the same deficiencies evident in AT&T's original Tariff 12 filings and the revisions made under Transmittal 1592 to implement the *April 18 Order*.[1] MCI asserts Option VI is deficient because targeted at a specific user, and because the customer's physical locations were a critical factor in rate development. MCI Petition at 2-3. MCI contends AT&T must develop a generally available service, and comply with Sections 61.38, 61.40, and 61.54 of the Commission's Rules. *Id.* at 4-5.[2]

6. Sprint's joint petition states that VTNS Options VI and VII share the general deficiencies of prior Tariff 12 offerings. Sprint contends that AT&T failed to provide working papers explaining its "revenue-less-cost" results, or the studies upon which its models rely. Sprint claims that AT&T violated Section 61.38(c) of the Commission's Rules. Sprint asserts the combination of omissions and aggregated results precludes useful analysis of the support materials. Sprint Petition at 3. In addition, Sprint asserts that while the average net investment must be small because depreciation for both options is "almost non-existent," no basis is provided for concluding that, for example, Option VII is less investment-intensive than AT&T's overall operations. *Id.* at 6-7.

7. Sprint also contends that AT&T's projected state and federal taxes are improperly understated because based solely on earnings attributable to the equity portion of AT&T investment. Sprint further complains that AT&T has not specified which of two models is used to develop tax expense for private line and switched service elements of VTNS. *Id.* at 7-8. Finally, Sprint asserts that AT&T's models generate approximately equal expenses regardless of the demand associated with a particular option. *Id.* at 9-10.

8. Williams states that Transmittal 1649 incorporates "virtually all" the deficiencies identified by the Commission in its *April 18 Order*, as well as other defects asserted with respect to prior transmittals. Williams Tr. 1649 Petition at 1-4. Williams argues, for example, that the specific network attributes of Option VI are targeted for a specific customer, and that determining whether a customer request is "substantially similar" to such an offering is entirely within AT&T's discretion. *Id.* at 4.

9. Williams also argues that AT&T's cost support is dependent on the "totally undocumented" assertion that the customer would be lost to AT&T absent the proposed service package, that AT&T's demand projections do not justify the proposed rates, and that significant disparities in the rate structures developed for the several VTNS options preclude anyone other than AT&T or the favored customer from determining how rates were derived or whether they are reasonable. *Id.* at 6-8. Finally, Williams states that there is significant rate structure disparity among Tariff 12 options. Williams says a basic charge for

measured remote ports under Option II that calculates to $241 per port while the comparable (derived) basic charge per port under Option IV is $101. *Id.* at 8-9.[3]

10. AT&T states in its joint reply that the specification of ports, DTCs, and VTCs in an initial configuration does not restrict Options VI and VII to a single customer, absent indications from customers that they are being denied service on that basis. AT&T notes that the use of LATA-specific access costs to develop VTNS options in no way implies a limitation of service to the geographic areas served by the LECs involved with the initial offerings. AT&T Reply at 3-4.

11. AT&T notes that Williams' analysis ignores the effect of DTCs included in each of the compared services' aggregate basic charge. AT&T responds to contentions by IDCMA and Sprint respecting the minimal installation costs for Option VII by stating that the customer has committed to a minimum term of five years and all installation costs will be recovered during this term. *Id.* at 5 n. * * *.

12. AT&T replies to allegations of vagueness by stating that the definition of VTC contained in Section 7.2.26 of the tariff specifies its capacity, and argues that the specification of DTC transmission speed as "9.6 kbps and below" is responsive to customer requests for flexibility and has occasioned no customer complaints. *Id.* at 7-8. AT&T states that its tariff support materials satisfy the requirements of the Commission's Rules and demonstrate, after accounting for the cross-elastic effects of the offerings, that revenues exceed costs on both a discounted and non-discounted basis for the two options.

13. The Common Carrier Bureau has reviewed AT&T's Transmittal Nos. 1649 and 1650, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the proposed tariff is so patently unlawful as to warrant rejection, and that an investigation of Transmittal Nos. 1649 and 1650 is not warranted at this time.

14. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal 1649 and Transmittal 1650, filed by the Independent Data Communications Manufacturers Association, Inc., by MCI Telecommunications Corporation, by US Sprint Communications Company Limited Partnership, and by Williams Telecommunications Group, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, DA 89-743, released June 30, 1989 (Com. Car. Bur.).

[2] A separate MCI petition against Transmittal 1650 asserts essentially the arguments directed against Option VI.

[3] Williams' separate petition relating to Transmittal 1650 closely tracks the arguments made with respect to Transmittal 1649, expanding its argument slightly with respect to contentions of deficient cost support. *See* Williams Tr. 1650 Petition at 7 n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Midyear 1986 Access Tariff Filings

Petitions for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1989; Released: August 7, 1989

By the Chief, Common Carrier Bureau:

1. On July 29, 1988, this Bureau granted the Ameritech Operating Companies (Ameritech) and the BellSouth Telephone Companies (BellSouth) waivers of that portion of the Commission's *December 19 Order* [1] directing local exchange carriers (LECs) to provide originating WATS access lines (WALs) with Feature Group A (FGA) and Feature Group B (FGB) services.[2] Ameritech and BellSouth have filed petitions[3] for extensions of these waivers, which expired on August 1, 1989. The pending waiver requests are unopposed.

2. Ameritech states that, as a condition of the extended waiver, it would continue to offer interexchange carriers (ICs) a reasonable alternative method of providing OutWATS service to customers served from nonconforming offices. Ameritech Petition at 2. According to Ameritech, major modifications would have to be made to its billing systems in order to provide originating WALs in connection with FGA. It argues that the expense of such modification is unwarranted since there continues to be no demand for the service. *Id.* at 4. Ameritech asserts that any IC wishing to provide OutWATS service to customers served by a nonconforming office can use WATS Access Line Extensions (WALEs) to connect those customers to offices with equal access capability. Ameritech maintains that the Other Common Carriers (OCCs) and American Telephone and Telegraph Company (AT&T) have total parity since the OCC is not charged for such a WALE if a WALE would be required by an OCC but not by AT&T. *Id.* at 5.

3. BellSouth also asserts that costly modifications to its switching and billing systems would be necessary in order to provide WALs in connection with FGA and FGB. BellSouth Petition at 2-3. It proposes to continue to provide nonchargeable WALEs to the nearest equal access WATS serving office as a means of meeting its service obligations. *Id.* at 1.

4. The Bureau has reviewed the waiver requests and has concluded that the public interest would be served by a one-year extension of the existing waivers.

5. Accordingly, IT IS ORDERED that the petitions for waiver filed by Ameritech Operating Companies and the BellSouth Telephone Companies ARE GRANTED to the extent indicated herein.

6. IT IS FURTHER ORDERED that the waiver granted by this Order expires on August 1, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Midyear 1986 Access Tariff Filings, 1 FCC Rcd 1247 (1986) (*December 19 Order*).

[2] *See* Midyear 1986 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 4838 (1988).

[3] Ameritech Operating Companies Petition for Continuation of Waiver, filed July 25, 1989 (Ameritech Petition); BellSouth Telephone Companies Petition for Waiver, filed July 27, 1989 (BellSouth Petition).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CONTINENTAL SATELLITE CORPORATION	DBS-87-01
ECHOSTAR SATELLITE CORPORATION	DBS-88-01
DIRECTSAT CORPORATION	DBS-88-02
ORBITAL BROADCASTING COMPANY	DBS-88-03
TEMPO SATELLITE, INC.	DBS-88-04
DIRECT BROADCAST SATELLITE CORPORATION	DBS-88-08

For Construction Permits for New Direct Broadcast Satellite Systems;

ADVANCED COMMUNICATIONS CORPORATION	DBS-88-05-MP
UNITED STATES SATELLITE BROADCASTING COMPANY, INC.	DBS-88-06-MP
HUGHES COMMUNICATIONS GALAXY, INC.	DBS-88-07-MP

For Modification of Construction Permits for Direct Broadcast Satellite Systems.

In re Permit of

DOMINION VIDEO SATELLITE, INC.

Modification of Construction Permit for Direct Broadcast Satellite System.

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1989; Released: August 15, 1989

By the Commission: Commissioner Dennis issuing a statement.

1. On February 3, 1988, the Commission issued a Public Notice (Report No. DBS-5A) accepting for filing the applications for Direct Broadcast Satellite ("DBS") systems of Continental Satellite Corporation ("Continental") and EchoStar Satellite Corporation ("Echostar"). A cut-off date of April 8, 1988 was established for the filing of any additional applications to be considered with them. On April 8, 1988, new applications for DBS systems were filed by DIRECTSAT Corporation ("Directsat") and TEMPO Satellite, Inc. ("Tempo").[1] On the same date, Direct Broadcast Satellite Corporation ("DBSCorp"), which had earlier requested an extension of its conditional construction permit, requested consideration as a new applicant in the event its extension request were to be denied. Also on that date, applications for modification of existing DBS construction permits were filed by Advanced Communications Corporation ("Advanced"), United States Satellite Broadcasting Company, Inc. ("USSB"), and by Hughes Communications Galaxy, Inc. ("Hughes"); and Continental modified its pending application.

2. The Association of Maximum Service Telecasters ("AMST") has filed "Comments" opposing each of the subject applications, and the National Black Media Coalition ("NBMC") has filed a petition to deny the applications of Advanced, DBSCorp, Hughes, Orbital, and USSB. In addition, petitions to deny Tempo's application have been filed by Advanced, by the Wireless Cable Association ("Wireless Cable"), and by the National Association for Better Broadcasting and the Telecommunications Research and Action Center ("NABB/TRAC"). The Motion Picture Association of America ("MPAA") filed an untimely and unauthorized pleading opposing Tempo's application. Finally, GTE Spacenet ("GTE") has filed comments in response to the applications of Echostar and Continental, which apply to the other applications as well.

3. On October 19, 1988, the Commission staff directed a letter to all DBS permittees and applicants requesting their comments on the Commission's policy for allocating DBS channels and orbital locations. Responses were submitted by most of the DBS entities, including technical studies by two, and several replies to those responses were also filed.

4. This Order first considers orbital assignments and service areas in light of the advancements in transmission technology and systems for DBS, as well as the increased demand for the DBS orbit/spectrum resource presented by the subject applications. The Order concludes that half-CONUS signals[2] will be allocated only in east/west pairs, with eastern half-CONUS service permitted only from the four DBS orbital locations furthest east and western half-CONUS service permitted only from the four DBS orbital locations furthest west. (*See* paragraphs 7, 8, below.) The outstanding authorizations at variance with this allocation policy will be modified to conform. (*See* paragraphs 12 - 14, below.) Full-CONUS signals will also be authorized from those orbital locations from which such service is feasible and in keeping with United States treaty obligations. (*See* paragraphs 9, 10, below.) This Order also

considers and denies a request filed by Advanced seeking an allocation at the same orbital location as Hughes to reuse the same channels as Hughes. (*See* paragraphs 15, 16, below.) This Order then considers the qualifications of each of these applicants and the availability of requested DBS facilities, and disposes of these applications and associated petitions to deny. All of the applications except Tempo's are granted to the extent possible, with all applicants receiving a reservation for a pro-rata share of the orbit/channel allocations available. (*See* paragraphs 54 - 57, below.) Action on Tempo's application is withheld pending further consideration of its qualifications, with its pro-rata share of the remaining allocations also held in reserve pending the outcome of the further considerations. (*See* paragraphs 53, 56, below.)

ORBITAL ALLOCATIONS AND SERVICE AREAS

Background

5. The basis for domestic DBS allocation policies is provided by the Region 2 Plan (Appendices 30 and 30(a), ITU Radio Regulations). This Plan provides, in pertinent part, for service to eastern areas of the continental United States from each of four "eastern" orbital locations (61.5^{0}W, 101^{0}W, 110^{0}W, and 119^{0}W) and to western areas from each of four "western" orbital locations (148^{0}W, 157^{0}W, 166^{0}W, and 175^{0}W). The Commission has granted authorizations for proposed systems which are at variance with the Plan; *e.g.*, the operation of two satellites at the same orbital location, with one satellite serving the eastern part of the country and one serving the western part of the country. Such proposals were permitted, to the extent they did not violate the interference parameters established in the Plan, in order to afford permittees the maximum flexibility in designing and implementing their services, both to take advantage of changes in technology and to present the most efficient or effective service from a business perspective.[3] Initially, the limited number of applicants and channels requested, coupled with the flexibility of the provisions of the Region 2 Plan, provided significant latitude in defining and characterizing proposals for use of the DBS spectrum/orbit resource and in allocation of that resource. This policy of maximum flexibility in allocations was intended to contribute to the ability of early DBS participants to initiate this new service expeditiously, as well as efficiently or economically.

6. With the applications under consideration in this Order, the demand for channel/orbit allocations far exceeds the available supply. Furthermore, those permittees who were expected to be operational, or nearly operational, by now, have not achieved that goal and have requested, or are in need of, authority to modify their authorizations to permit additional time to implement their systems. Under these circumstances, and in recognition of the rights and equities attendant to the various applicants and permittees at issue in this Order, certain aspects of the allocation policy must be refined in order to assure an equitable and more efficient allocation of the DBS resource among the qualified and competing applicants. As discussed in the following sections, the necessary refinements in the allocation policy will reduce flexibility in some respects, but enhance it in more meaningful respects.

Half - CONUS Service

7. To date, the Commission has authorized DBS operators to transmit complementary half-CONUS signals that, when combined, would provide signal coverage over the entire continental United States.[4] As noted, the United States has eight orbital locations from which to transmit DBS service in the 12.2 - 12.7 GHz band. Given the transmission and reception technology and equipment available currently and in the foreseeable future, three of the domestic DBS orbital locations, 101^{0}W, 110^{0}W, and 119^{0}W, are suitable for delivering DBS service to any part of the continental United States; one location, 61.5^{0}W, is suitable for service into the eastern United States but only marginally suitable for service into the western United States; and four locations, 148^{0}W, 157^{0}W, 166^{0}W and 175^{0}W, are suitable for DBS service only to the western United States. Thus, while the western United States can be covered from seven or eight of the eight orbital locations, the eastern United States can be covered only from the four "eastern" orbital locations. Consequently, a western orbital location, which can serve only the western United States, can be part of a national system only when used in conjunction with one of the eastern locations serving the eastern United States. As a result, every time an eastern location/channel is allocated, a western location/channel becomes unavailable for use as part of a nationwide system, whether or not that western location/channel is actually utilized to deliver a DBS signal.[5] In light of this, it is clearly evident that to permit an eastern channel to provide a service that is limited to western half-CONUS utilizes that spectrum/orbit resource less intensely.[6] The number of potential DBS operators that can be accommodated is correspondingly reduced, as well.

8. As emphasized particularly by Hughes, the Commission is also concerned that DBS service can be implemented in a commercially successful manner. Thus, balanced against the concern for intensive utilization of the orbit/spectrum resource are the economic and operating efficiencies achieved for individual operators, which would correspondingly benefit consumers, by colocating eastern and western half-CONUS channels and satellites at the orbital locations suitable for such operation (101^{0}W, 110^{0}W, and 119^{0}W). Colocating satellites reduces the number of uplink facilities required to transmit to the satellites, simplifies the design of any spare satellite which might be built, and increases the flexibility an operator would enjoy in delivering its service, particularly if a loss of transponder(s) or satellite required reconfiguration of signals. Nevertheless, in light of the current demand for DBS facilities, these benefits are not sufficient to justify the considerable, and possibly critical, reduction in the allocations which could be made to each of the applicants and the corresponding reduction in the number of potential channels of service available to the public, both of which would result from permitting colocation of eastern and western half-CONUS signals. Moreover, many of the benefits claimed for colocated half-CONUS channels will be achievable with the probable introduction of full-CONUS service, as discussed in paragraphs 9, 10, below.[7] Consequently, orbit/channel allocations will not be made without regard to their effect on the overall availability of remaining allocations suitable for nationwide DBS service, and western half-CONUS service will not be permitted from "eastern" orbital locations.

Full - CONUS Service

9. Hughes and USSB have submitted studies delineating the effects of simultaneous full-CONUS signals from the orbital locations 101 ^{0}W, 110^{0}W, and 119^{0}W, and Hughes' study also delineates the cumulative effects of an additional full-CONUS signal from 61.5^{0}W. These studies indicate that such simultaneous operations would not violate the interference constraints of the Region 2 Plan for DBS.[8] With current technology, these are the only locations from which a suitable signal can be delivered over the entire United States.[9] While the Commission staff will soon acquire the resources necessary to analyze independently the studies submitted by Hughes and USSB, it does not presently have that technical capacity. Nonetheless, those studies are sufficiently persuasive to warrant authorization of such services from a technical standpoint, under the condition that any such authorization may be modified or rescinded if the studies are ultimately contradicted. Use of a channel from one of these locations for full-CONUS service would also preempt the use of a western location channel - in effect the same western location channel that would otherwise have been used to complement the eastern location channel if it were operating half-CONUS. However, a full channel of nationwide service would result in either case, so that no difference in resource utilization results from such a service.[10]

10. Accordingly, full-CONUS signals will be conditionally authorized, pending final confirmation of their compliance with the United States' obligations under the Region 2 Plan. Upon application, any DBS permittee or operator will be authorized to use its "eastern" allocation for full-CONUS service rather than half-CONUS service on each channel assigned and, if necessary, locate its "western" satellite(s) at its designated eastern location in order to provide the additional power required for full-CONUS signals.[11] Use of the western allocations is being addressed in a separate proceeding.[12]

Equality of Orbital Locations

11. The Commission, through its rules, has deemed all channel/orbit allocations to be of equal value, so that no applicant or conditional permittee can claim a right to any specific allocation as long as unassigned allocations remain available in numbers adequate to fulfill its application requirements.[13] When authorized for half-CONUS service and allocated in east/west pairs, it is still not definite that any particular eastern orbit/channel allocation has an intrinsic value greater than any other eastern allocation, or that any particular western allocation has an intrinsic value greater than any other western allocation. Accordingly, the rule that orbital locations will be considered of equal value and comparative rights will not arise with respect to any particular orbital position (47 C.F.R. §100.13(b)) is dispositive of any claim that applicants should be entitled to particular orbital positions.

Modifications of Outstanding Authorizations

12. Dominion currently holds an authorization that includes western half-CONUS service from 119^{0}W, and Hughes currently holds an authorization that includes western half-CONUS service from 101^{0}W. Both of these authorizations contravene the Commission's orbital allocation policy, as stated here, and will be modified. Each authorization was made at a time when available orbit/spectrum allocations were plentiful, and with the clear expectation that service would be initiated relatively promptly. Hughes and Dominion have not proceeded with the construction of their systems in the time frames required by their authorizations, and circumstances are now significantly changed. Demand for DBS facilities increased to the point where it now requires more intensive utilization of the DBS orbit/spectrum resource to accommodate additional participants, and Dominion and Hughes are not now in position to initiate service sufficiently before other potential operators to justify operations which would result in a less intensive use of the orbit/spectrum resource.[14] Additionally, it is not apparent that construction of either system has progressed to the point that it would be significantly affected by modification of the authorization. Moreover, each party was explicitly advised of the possibly temporary nature of these nonconforming allocations.[15] Under these circumstances, continued reservation of eastern channels for western half-CONUS service cannot be justified. Accordingly, Dominion and Hughes will be given 20 and 30 days from the release of this Order, respectively, within which to specify which eastern orbit/channels they wish to retain (eight for Dominion, sixteen for Hughes) and to request a western orbital location and channels for their western service satellites, from among those currently available.[16]

13. Dominion has objected that paired-only allocations would require it to reconfigure its system and alter its business plan to provide for two 16-channel satellites. This statement, however, reflects a misunderstanding of the Commission's allocation policy and neglects the limitations of Dominion's authorization. The paired-only requirement will only affect operators utilizing half-CONUS signals. Dominion is authorized to provide sixteen half-CONUS signals. This would not require two 16-channel satellites, as asserted by Dominion. Rather, it would require two 8-channel satellites operating with half-CONUS signals or one 8-channel satellite operating with full-CONUS signals. As eight full-CONUS channels require roughly the same capacities as sixteen half-CONUS channels, the optimum current design according to Dominion, there would be no significant loss of operating economy.[17] Thus, modification of Dominion's allocation should have a minimal effect, at most, on its plans.[18] If Dominion deems its current authorization obsolete due to changes in technology or its intended use of the STC satellite, it can take steps to optimize its system configuration, *e.g.*, by merger with another DBS permittee or purchase of another outstanding authorization.

14. Hughes also has objected that paired-only allocations would diminish efficiency and require a complete reordering of its business plan. The Commission's willingness to authorize full-CONUS signals in lieu of half-CONUS pairs should alleviate any concerns of perceived inefficiency of operations due to paired only half-CONUS signals, *i.e.*, whatever adverse impact could result from reallocating half of Hughes' channels to a western location is diminished, if not eliminated, by permitting full-CONUS operations from the sixteen eastern-location channels Hughes would retain. Any business plans that Hughes may have developed presuming more than sixteen channels of nationwide service were not based on any authorization issued by this Commission.[19] Finally, Hughes will receive authorization for additional channels

based on its modification application, and can obtain further additional channels, if it deems it necessary, *e.g.*, by merger or by purchase of another party's permit.[20]

Duplicate Orbital Assignments

15. Prior to the recent emphasis on full-CONUS channels becoming the common mode of operation, Advanced requested orbit/channel allocations to mirror Hughes' current allocations, proposing to use the same channels as Hughes to serve the opposite half of the U.S. with each channel as Hughes would serve. That is, if Hughes would serve the western U.S. with even channels and the eastern U.S. with odd channels, Advanced would serve the western U.S. with odd channels and eastern U.S. with even channels, while operating from the same orbital location as Hughes. Advanced claimed that this is possible using digital transmission technology, although it would have to give up some service to the central U.S., losing approximately five percent of the U.S. population. It also claimed that if Hughes were to use digital transmission technology as well, no service would be lost. Hughes has strenuously opposed Advanced's request.

16. Advanced's proposal, even if technically sound, would not be possible to effectuate in conjunction with full-CONUS operations, as authorized in this Order. Based on Advanced's modification application and its comments in connection with the orbital allocation issue, it appears that Advanced is more interested in pursuing full-CONUS operations than colocated, mirror-image half-CONUS operations. Consequently, the request will be considered moot and it will be dismissed without prejudice.

DESCRIPTION OF NEW APPLICATIONS

Continental Satellite Corporation

17. Continental is a California corporation incorporated for the purpose of constructing, launching, and operating a DBS system. All of its principals are identified in its application, and Continental is legally qualified to hold a DBS authorization.

18. Continental proposes to launch three satellites, with one serving the eastern half of the continental United States ("half-CONUS") and one serving western half-CONUS with sixteen channels each, and one serving the full continental United States ("full-CONUS") with eight channels. The half-CONUS satellites would operate at 100 watts per channel, for an effective isotropic radiated power ("EIRP") of 51 dBW for all channels on all satellites. The power and signal strength levels for the full-CONUS satellite are not specified. Continental apparently does not intend to serve any areas outside the 48 continental states. (Continental's preferred orbital positions are 61.5°W and 148°W for the half-CONUS satellites and 110°W for the full-CONUS satellite.) Continental's satellites would have 24-for-16 transponder redundancy and full eclipse protection from stored (battery) power. Continental proposes to build one on-ground spare.

19. Continental proposes to program some of its capacity (including "value-oriented, alternative" channels), and to lease some, presumably on a non-common carrier basis. It states that it will actively participate in a variety of research and development projects intended to enhance the quality and amount of video services offerred via DBS systems. Continental projects expenses of $410 million to build and launch three satellites. NRG Datacom, Inc. expects to raise the necessary funds for Continental through equity issues.

EchoStar Satellite Corporation

20. Echostar is a Colorado corporation incorporated for the purpose, among other more general purposes, of constructing, launching, and operating a DBS system. It is 79% owned by Echosphere Corporation, which it states is one of the largest distributors of home satellite receive equipment in the United States. The remaining stock is owned by two individuals, one of whom is the president of Echosphere. Echostar is legally qualified to hold a DBS authorization.

21. Echostar proposes to launch two satellites, with each serving half-CONUS with sixteen channels at 100 watts each, for an EIRP of at least 51 dBW at edge of coverage. It may also provide spot beam service to unspecified discrete market areas. It expects to be able to provide "limited" full-CONUS service on an emergency basis, if necessary. Echostar apparently does not intend to serve any areas outside the 48 continental states. (Its preferred orbital positions are 61.5°W and 148°W, unless other positions currently held by others become available.) Echostar proposes to build one on-ground spare, and provide six-for-four transponder redundancy. Six channels would be eclipse protected at full power (or more channels at lesser power) by battery.

22. Echostar proposes to program some of its capacity and lease some on a non-common carrier basis. It projects total costs for three satellites, two launches, ground facilities and support and one year marketing and operations to total $496 million. Echostar's parent, Echosphere, has committed to finance the construction and continued operation. Echosphere enjoys a $50 million line of credit and will finance the remaining costs with additional debt and with equity offerings. Merril Lynch and Hanifen, Imhoff, Inc. have indicated their interest in raising the necessary additional funds through equity offerings, and Hanifen has expressed its expectation that the funds can be raised successfully. In addition, Scott Science and Technology, a satellite financing, construction and launch manager, has expressed its expectation that the necessary funds can be raised.

DIRECTSAT Corporation

23. Directsat is 77% owned by SSE Telecom, Inc., a telecommunications company which specializes in satellite technology. The remainder of its stock is held by three individuals. The officers and directors of Directsat and SSE are identified, as well as the shareholders of Directsat and the cognizable shareholders of SSE. Directsat is legally qualified to hold a DBS authorization.

24. Directsat proposes to launch two satellites, with each serving half-CONUS with sixteen channels at 100 watts each, for an EIRP of at least 51 dBW at edge of coverage. Directsat apparently does not intend to serve any areas outside the 48 continental states. (Its preferred orbital positions are 101°W and 148°W.) Directsat proposes to build one on-ground spare, and provide six-for-four transponder redundancy. A battery would power an unspecified number of channels through eclipse periods.

25. Directsat proposes to lease all of its transponder capacity to program packagers and other businesses that would serve individual receive dish owners, as well as to those providing sales, training and other video materials to business and educational organizations. It specifically expects to target cable television program suppliers, public broadcasting station operators, High Definition Television ("HDTV") broadcasters, as well as ancillary "business" service providers. Estimated expenses for construction and launch aggregate to approximately $320 million for the two-satellite system, with another $14 million estimated for first year operations. Directsat proposes to finance its operation, without reliance on revenues, with the assistance of PaineWebber Incorporated and Strategic Research, Inc. PaineWebber and Strategic Research have both expressed their interest in raising the required funds, with Strategic Research expressing its opinion, based on experience in supporting other telecommunications ventures, that the financing is feasible and attainable.

TEMPO Satellite, Inc.

26. Tempo is wholly-owned by TEMPO Enterprises, Inc., which is wholly-owned by Tele-Communications, Inc. ("TCI"), a publicly held company engaged primarily in the cable television business, with licenses for a variety of other communications services. The principals of all companies are identified in this or other incorporated applications. Tempo's legal qualifications are further discussed in paragraphs 49 - 53, *infra*.

27. Tempo proposes to launch two satellites, with each serving half-CONUS or full-CONUS with sixteen channels at 100 watts each or eight channels at 200 watts each, for an EIRP of 51 dBW or 48 dBW, depending on configuration. Tempo would also serve Puerto Rico and the Virgin Islands. (Its preferred orbital positions are 110^{0}W for each satellite.) Tempo proposes to build one on-ground spare, and provide six-for-four transponder redundancy. Up to six channels on each satellite will be eclipse protected for service at full power, or more channels will be provided lesser power, by battery.

28. Tempo proposes to operate and program its facilities as a non-common carrier, and to provide half of its channels for "free" and half on a subscription and/or pay-per-view basis. Tempo estimates costs of approximately $500 million to launch and operate its two-satellite system for one year. Tempo proposes to finance its venture with funds from "operating income, equity contributed by principals, and loans to be secured as required." Also, "the total debt of $1.3 billion will be supported by starting equity of $250 million [with] further equity to be raised over a five-year period as required supported by the assets of the corporation." Tempo's parent, TCI, explicitly states its intention to support Tempo's venture.

Direct Broadcast Satellite Corporation

29. DBSCorp has held a construction permit since October 3, 1986. That permit was granted with the condition that DBSCorp begin construction or secure a construction contract within within one year of that date.[21] Unable to meet that requirement, DBSCorp requested an additional year, citing its vigorous efforts, including past involvement in the earlier development of DBS, and a variety of circumstances which it believes now make it more possible to succeed. It contended that an additional year would give it the opportunity to pursue promising new business opportunities. More than one year has elapsed since that request, during which time the Commission refrained from taking any unnecessary negative action. DBSCorp has not satisfied the due diligence requirement, even belatedly (or made any significant progress of which we are aware), and its subject conditional construction permit will be canceled.

30. During the cut-off period for the subject applications, DBSCorp requested that if its extension request were denied and its permit canceled, it be considered as a new applicant with the current group. Had DBSCorp's extension request been acted upon previously, it could have applied on time in a more routine fashion. Accordingly, its application will now be considered with the current group, and assigned File No. DBS-88-08.[22]

31. DBSCorp is a corporation formed for the purpose of providing DBS service, and has no other business activities. Its primary principals are Kansas City Southern Industries, Inc., a company with operations in transportation, financial services, real estate, and broadcasting, and several individuals involved in communications and technologies industries. DBSCorp has previously been found legally qualified; there is no information upon which to reconsider that finding.

32. DBSCorp proposes to launch two satellites, with each serving half-CONUS with sixteen channels at 100 watts each, for an EIRP of 51 dBW at edge of coverage. Its spacecraft will be designed to provide quarter-CONUS service on demand, and it requests authorization to utilize up to four channels for spot beam coverage for regional broadcasts and for increasing EIRP for HDTV. (Its preferred orbital positions are 110^{0}W and 148^{0}W.) DBSCorp does not plan to build a spare satellite. DBSCorp's satellites will provide nine-for-six transponder redundancy, and one third of its channels will be eclipse protected.

33. DBSCorp proposes to lease its transponder capacity on a non-common carrier basis. It lists anticipated expenses totalling $524 million to put its system into operation. It has entered an agreement with a securities company which states its expectation of raising the necessary funds through a combination of debt and equity placements.

DESCRIPTION OF MODIFICATION APPLICATIONS

Advanced Communications Corporation

34. Advanced is currently authorized to build and operate two satellites, with each serving half-CONUS, including Puerto Rico and the Virgin Islands, with sixteen channels at 125 watts each for an EIRP of "at least" 51 dBW. (In conjunction with this Order, Advanced is allocated the sixteen odd-numbered channels at 110^{0}W and at 148^{0}W.[23] (*See* n. 42, *infra*.)) Advanced has no provision for a spare satellite. Advanced would have six-for-four transponder redundancy, and up to six channels on each satellite will be eclipse protected for service at full power, or more channels will be provided lesser power, by battery.

35. Advanced has modified its proposal, seeking authority to operate each of its thirty-two channels over full-CONUS (from a suitable orbital location). It asserts that this is a minor change. In support of its request, it relates that its satellite builder (GE Astro-Space Division) is "confident that full-CONUS coverage from their Series

5000 spacecraft to receiving antennas two feet in diameter with at least minimum EIRP power levels can be provided." GE Astro later submitted a letter stating that it is capable of providing a DBS system that could provide full-CONUS service at a 51 to 52 dBW signal strength on the ground. Advanced's most recent amendment states that channels will be operated at either 130 or 260 watts, with fewer channels operated if the higher power is used. (Advanced requests an allocation of all thirty-two channels at 110^0W; sixteen of those channels are being allocated to it pursuant to its earlier application.[24]

36. Consistent with the analysis of DBS allocations policy set out in paragraphs 7 - 10, *supra*, this request constitutes a major amendment of Advanced's existing permit. As explained in the earlier discussion, Advanced's proposed change from thirty-two half-CONUS channels to thirty-two full-CONUS channels would double the orbit/channel allocations its system would consume, and it must be considered as a major change. Advanced's current authorization for sixteen pairs of half-CONUS channels is convertible to only sixteen full-CONUS channels as a minor modification. Advanced did not pay the filing fee required for a major amendment in the DBS service, believing its request to be a minor amendment, for which there is no filing fee. As the Commission's DBS allocation policy explained in this Order had not been explicitly stated at the time Advanced filed its amendment, Advanced will not be faulted or penalized for its failure to recognize its modification as a major amendment, and will be permitted to pay its filing fee late, without penalty, within fifteen days of the release date of this Order.

United States Satellite Broadcasting Company, Inc.

37. USSB is currently authorized to build and operate two satellites, with each serving half-CONUS with eight channels at 240 watts each for an EIRP of approximately 54 dBW. (USSB has been allocated eight even channels at 110^0W for eastern service and at 148^0W for western service.)

38. USSB now proposes to operate each channel at 260 watts, for half-CONUS signals with an EIRP of approximately 55 dBW at edge of coverage and full-CONUS signals with an EIRP of approximately 52 dBW at edge of coverage. It seeks authority to operate its 110^0W satellite at full-CONUS until its 148^0W satellite is placed in operation. USSB will not build a spare satellite. It will have seven-for-four transponder redundancy. It will have 75% eclipse protection, so that six channels of each eight can operate at full power or all eight channels can operate at 75% power. This request constitutes a minor amendment. USSB also states that it may seek reallocation of its 148^0W satellite to 110^0W if satellite colocation is permitted by the Commission.[25]

Hughes Communications Galaxy, Inc.

39. Hughes is currently authorized to build and operate two satellites, with each serving half-CONUS with sixteen channels at 100 watts each for an EIRP of 51 dBW. (Hughes has been allocated all of the channels (thirty-two) at 101^0W, sixteen for eastern service and sixteen for western service, with full-CONUS operation permitted on an "emergency" basis.) Hughes has no plans for a spare satellite. Hughes does plan full eclipse protection for all channels, and will have a 24-for-16 transponder redundancy.

40. Hughes now seeks authority to operate thirty-two full-CONUS channels on a full-time basis with 180-watt TWTA's, for a claimed EIRP of 52 dBW at edge of coverage. All channels will be eclipse protected by battery backup. It also seeks authority to use 3 mHz of the channel guardbands of each channel to expand each channel from 24 mHz to 27 mHz wide, in order to facilitate transmission of high definition television ("HDTV") signals. In conjunction with this request, it also requests modification of the specific channels assigned to each of its satellites for more efficient channel pairings.[26] Hughes' request, as Advanced's, constitutes a major amendment.[27]

PETITIONS TO DENY

Association of Maximum Service Telecasters

41. AMST opposed all of the applications, contending that no new authorizations should be permitted in the 12.2 - 12.7 GHz band while that spectrum is being considered for terrestrial Advanced Television Service ("ATV"). The allocation of this spectrum for DBS is well-settled, and mere "consideration" of other uses, in the absence of an allocation Rule Making, does not warrant withholding authorizations that are consistent with the allocation. Moreover, the most recent Commission statement regarding "consideration" of this spectrum for ATV is that this spectrum is not suitable for terrestrial ATV use. *Tentative Decision and Further Notice of Inquiry* in MM Docket No. 87-268, 3 FCC Rcd 6520, 6530-31 (1988). Accordingly, AMST's petition will be denied.[28]

GTE Spacenet

42. GTE has requested that the Commission institute a Rule Making to redefine the distinction between Fixed Satellite Service ("FSS") and DBS service. It asks, alternately, that the Commission uphold the limitations on nonconforming uses[29] and analyze the subject applications with those limitations in mind.

43. Applications in any service are always fully scrutinized in all respects, including the propriety of any proposed service. None of the current applicants is proposing service at odds with the provisions for DBS service or the Commission's decision in *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977, *supra*. Accordingly, it is not appropriate to resolve issues regarding alternate uses here. As stated in n. 12, *supra*, comments are being solicited on the subject of offering additional services from western DBS orbital locations.

National Black Media Coalition

44. NBMC has filed petitions to deny several of the subject applications on the basis that each has failed to meet its Equal Employment Opportunity obligations. NBMC insists that EEO enforcement is especially important for DBS, which is only now putting together a workforce. It further argues that several applicants have deliberately ignored the rule, even after having been apprised by NBMC of the alleged shortcoming, and that this is evidence of intent to discriminate. It contends that because common carriers and cable systems operators, as well as broadcasters, are subject to EEO regulation by the Commission, no DBS applicant should be exempted from compliance by disclaiming any intent to operate as a broadcaster. Each applicant will be discussed below.

45. *DBSCorp*. NBMC points out that DBSCorp submitted no EEO program with its subject application. DBSCorp adamantly disavows an intent to discriminate. It maintains that it is not yet an operational company, that it will make its employment policy explicit and detailed when it enters the marketplace for employees, and that it will comply with all Commission policies in effect at that time.

46. *Advanced, Hughes, and USSB*. NBMC charges that each of these applicants has neglected to list any minority or female organizations from which it will recruit employees, or any minority media in which it will advertise for employees. In addition, Hughes and USSB have not listed minority and female educational institutions from which it will recruit employees. All three applicants respond that they were found qualified when their original permits were issued, and that their EEO compliance should not now be reviewed in conjunction with the modification applications they have filed. Hughes and Advanced contend that the EEO rules for DBS do not apply to them, as they do not intend to operate as broadcasters. Hughes insists that its parent's corporate policy, which was submitted, complies with Commission requirements even without specific recruitment sources, and refers to that parent's long record of compliance with EEO requirements as a government contractor to rebut the charge of discriminatory intent. Advanced points out that no specific facts are alleged indicating intentional discrimination.

47. *Resolution*. The EEO rules for cable systems and common carriers, cited by NBMC, do not apply to the DBS service. The Commission adopted specific EEO rules for the DBS service, and those rules apply only to those DBS entities which would operate as broadcasters.[30] Moreover, the Commission's determination to limit the application of EEO rules in the DBS service to DBS broadcasters was affirmed in *Report and Order* in Gen. Docket No. 85-305, 2 FCC Rcd 1001, n. 3 (1987); *aff'd, National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). To the extent petitions disagree with those Rule Making decisions, the proper course would be to file a petition for Rule Making. Under existing rules, however, only DBS operators which will operate as broadcasters are subject to EEO requirements and, in accordance with those rules, EEO requirements will not be extended to other DBS operators in the context of this licensing proceeding. Accordingly, only applicants intending to operate as broadcasters are required to file Model EEO Programs, as provided by the rule. (47 C.F.R. §100.51(c).)[31]

48. For any such applicant uncertain of the ultimate location of many of its facilities, specification of nationwide recruitment sources and media, and any prominent educational institutions will be appropriate, as done by several other applicants. Nationwide recruitment is commonplace, particularly for upper management jobs, and if it is desirable or appropriate for these entities, a nationwide affirmative action effort is equally appropriate, regardless of the ultimate headquarters location. As geographic locations do become more certain, EEO Programs should be further refined when appropriate. Compliance with current EEO provisions is equally important for previously authorized DBS permittees intending to operate as broadcasters, and they will be required to come into compliance with the current rules. Given the previous uncertainty over the pertinence of the EEO provisions, however, no DBS applicant governed by the rule which failed to file a program or whose program did not comply with the exact provisions of the rule will be disqualified or designated for hearing. Rather, the applications which are granted will be conditioned on full compliance with the provisions of Section 100.51(b) of the rules within thirty days of the release of this Order.[32]

Petitions Against Tempo

49. Petitions to deny Tempo's application have been filed by the National Association for Better Broadcasting and the Telecommunications Research and Action Center ("NABB/TRAC"), by the Wireless Cable Association ("Wireless Cable"), and by Advanced.[33] In addition, the Mass Media Bureau sent a letter to TCI regarding TCI's applications to acquire three broadcast stations in conjunction with its takeover of TEMPO Enterprises, Inc. (Tempo's former parent),[34] requesting further information regarding TCI's conduct in Jefferson City, Missouri, more fully discussed immediately below. TCI's response to that letter and NABB/TRAC's reply to that response are considered with the petitions and related pleadings in this proceeding.

50. Wireless Cable and Advanced assert that TCI's extensive cable system holdings, coupled with its earth station (satellite uplink) facilities and its interests in at least twelve cable progammers, would result in undue concentration of control in the video services marketplace if a DBS system were added to its holdings. They both refer to various public statements by industry participants and observers that the cable industry, and TCI in particular, has deliberately denied programming to its competitors, and that TCI has used its considerable market power and its interests in programming sources to negotiate preferential or exclusive programming contracts, preventing alternate outlets from competing effectively, or at all. Allowing an additional outlet source to TCI would exacerbate the problem, according to these petitioners. They both further maintain that the Commisison's policy goal of diversity would be thwarted by granting a DBS permit to Tempo. Advanced cites TCI's conduct in a cable franchise renewal proceeding in Jefferson City, Missouri as evidence of TCI's willingness to abuse a monopoly position. In that case, a $35.6 million verdict was rendered against TCI on alternate verdict of violation of federal antitrust law and tortious interference with business under Missouri law.[35] NABB/TRAC cites the same case as evidence that TCI lacks the requisite character to be a DBS permittee.

51. Tempo responds that the Commission has already decided not to impose a cross-ownership restriction on DBS, and appropriately so. It remarks that all claims of past anticompetitive conduct by cable system operators are anecdotal and hearsay, and contends that any concerns of future abuse are merely speculative. It contends that existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers. It insists that its conduct in Jefferson City, Missouri is outside the scope of Commission purview under its recently stated policy guidelines in *Character Qualifications Policy Statement*, 102 FCC2d 1179 (1986), *recon. denied* 1 FCC Rcd 421 (1986). It also contends that its application for a DBS permit is not encompassed by the *Character Policy*. It finally main-

tains that even if the misconduct in Jefferson City were subject to consideration, it would not cast doubt on Tempo's qualifications to hold a DBS authorization.

52. The prospect of an increase in the concentration of control of video entertainment sources and outlets which would result from TCI's acquisition of a DBS system through Tempo does not warrant denial or designation for hearing of Tempo's application. To the contrary, in fact, Tempo's participation could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming. As Tempo argues, existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in the other video entertainment distribution industries as well.

53. With regard to Tempo's fitness to be a DBS licensee, however, petitioners have raised potentially serious questions stemming from the misconduct of Tempo's parent, TCI, requiring examination and consideration by the Commission of the facts and circumstances surrounding TCI's conduct in the Jefferson City cable franchise renewal case. The Mass Media Bureau is sending a letter to Tempo requesting additional information concerning that conduct and any additional arguments concerning its relevance to and impact on Tempo's subject application. While this matter is being further considered, is not necessary to delay action on other pending applications which can be granted. Accordingly, the orbit/spectrum resource required to satisfy Tempo's service proposal will be held in reserve,[36] pending the result of further inquiry into its qualifications to hold a DBS authorization.

DISPOSITION OF APPLICATIONS

54. Each of the other applicants is fully qualified to hold the DBS authorization it seeks. However, the available allocations are not sufficient to fully satisfy the orbit/spectrum requests of all of the applications. Each of the applicants has an equal right to consideration for the requested facilities. Accordingly, each application seeking new or additional channels should be granted only to the extent that it is possible to award an equal number of general orbit/channel reservations to each applicant. Additionally, in the event the permit of any of these applicants, or of any of the current permittees, is surrendered or canceled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications. Specific allocations will be awarded, as always, on a first-come, first-served basis, as each applicant demonstrates due diligence.[37]

55. This authorization policy permits the continued participation of all of the applicants and also provides for the most prompt disposition of these applications, so that direct construction efforts can begin at the earliest possible time. The prime alternate procedure would be to evaluate comparatively all of the applications to determine which should be granted in their entirety and which should be denied. Creation and utilization of any comparative procedure would likely result in considerable delay and the expenditure of substantial Commission and applicant resources. Moreover, a comparative proceeding could well prove to have been unnecessary. If two of the current or new permittees surrenders or loses its permit, each of the remaining permittees seeking new or additional channels would then receive for its new or modification application a total of thirty-two new or additional channels. Finally, any comparative procedure adopted and utilized would likely be designed, in significant part, to compare the applicants' actual ability and willingness to construct and operate their systems. The most immediate and concrete demonstration of that willingness and ability, however, will be the timely initiation of construction of satellites, according to the procedures recently clarified.[38] The grant of these authorizations, as set out below, will require an actual demonstration of, rather than conjectural argument regarding, the willingness and ability to construct. Any and all of those parties which can and will proceed under these standards will end up with specific allocations. In the event that all of the permittees maintain their permits, and some of them determine that the resulting systems, smaller than requested,[39] are not tenable, they are free to seek Commission approval to combine assignments and resources through merger or buyout. Commission consideration of any such combination will include an assessment of its competitive effects and other relevant factors. Accordingly, the public interest will be best served by partial grant of all of the applications, as described below, rather than setting these applications for a comparative proceeding.

56. The eligible cut-off applicants' collective requests would require 240 of the available DBS half-CONUS channel/orbit allocations. However, only 160 half-CONUS orbit/channel allocations are available.[40] In recognition of the equal rights of these applicants to the available allocations, each of the seven new and modification applicants will be granted an equal number of orbit/channel reservations from the available supply. This will permit the reservation of 22 half-CONUS orbit/channel assignments for each applicant.[41] As previously stated, if the permit of any of these applicants, or of any of the current permittees, is surrendered or canceled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications.

57. The conditional construction permits granted herein will authorize the permittees to proceed with the construction of their systems and will be conditioned on each permittee's due diligence in beginning construction, or completing contracting for construction of its satellite(s) within one year, and beginning operation within six years, of the date of release of this Order (47 C.F.R. §10.19(b)). Specific orbital positions and channels will be assigned to each permittee upon its demonstration of due diligence on a first-come, first-served basis, as has been the procedure for past applicants. *DBS Processing Procedures, supra.*

58. All of the permittees are specifically referred to the recent discussion of standards regarding the adequacy of construction contracts in satisfaction of the due diligence requirement, and the subsequent monitoring of construction progress under those contracts. Specifically, due diligence showings must include regular specific construction progress milestones to facilitate monitoring of progress and financial commitment throughout the construction process sufficient to determine whether meaningful levels of advancement have occurred. Also, any changes in the timetable must be reported and explained. *United States Satellite Broadcasting Company, Inc., supra,* 3 FCC Rcd at 6861 (1988).

59. Hughes' request for 27-MHz-wide channels will be denied. The DBS channel designation scheme already has some overlap between channels, relying on cross-polarization to neutralize the negative effect of that amount of overlap. Moreover, the Region 2 Plan for DBS specifies that all odd channels be located at $+0.2^0$ and all even channels at -0.2^0 from the nominal orbital position. Thus some channel origination points would be moved by 0.4'. Hughes has not submitted information from which to ascertain the effects, if any, its proposed variant operation would have on other domestic or foreign DBS operations, including possible operations from the same orbital location by another entity. In the absence of a conclusion that there would be no adverse effect, a compelling justification is needed to warrant authorization of such an operation. Hughes' only specific justification, that it would use a wider channel bandwidth to implement HDTV is undercut in its recent biannual progress report, wherein it indirectly indicated that it has not determined the bandwidth or channel configuration it would require for HDTV. It also acknowledged that HDTV is deliverable over a 24-MHz-wide channel at a higher power. Should Hughes wish to continue to pursue this channelization scheme, it should submit a technical analysis and/or a justification for authorizing such an operation.

EXISTING SATELLITE CONSTRUCTION CONTRACTS

60. In the Order clarifying the due diligence standard and modifying the Commission's satellite construction monitoring procedures for DBS, existing permittees were required to update information regarding their existing construction contracts, in conformance with the clarified requirements. *Id.* Advanced requested permission to delay filing pending resolution of the issues affecting the DBS allocation policy, which occurs in this Order. Dominion's submission did not include specific construction milestones, and its payment timetable appears contingent on the issuance of this Order. USSB's submission does not include construction milestones in sufficient number or frequency to permit effective monitoring of its construction progress, and USSB neither specifies that all other provisions are as earlier submitted nor submits changed provisions. Hughes' construction progress line chart lacks sufficient clarity or detail regarding satellite construction. In any event, the specifications in all of those contracts, and the corresponding timetables, may well be affected by the provisions in this Order. Consequently, Dominion, USSB, Hughes, and Advanced will be required to file within sixty days of the release of this Order, updated information regarding their construction contracts and timetables.

61. From the system descriptions in several applications, it appears possible that Hughes and Advanced may have already under contract satellite capacity sufficient to meet their authorizations as modified herein. Those permittees are encouraged to demonstrate at the earliest possible opportunity that they have satisfied the due diligence requirement for the additional facilities granted in this Order, and to request the additional specific allocations they desire. If both parties make such a demonstration, their allocation requests will be considered in the order of their original contracts.[42]

ORDERING CLAUSES

62. Accordingly, IT IS ORDERED, That the petitions to deny filed by the Association of Maximum Service Telecasters, by the National Black Media Coalition, by the Wireless Cable Association, and by Advanced Communications Corporation ARE DENIED.

63. IT IS FURTHER ORDERED, That action on the petition to deny filed by the National Association for Better Broadcasting and the Telecommunications Research and Action Center IS DEFERRED pending further consideration of the application for DBS facilities filed by TEMPO Satellite, Inc.[43]

64. IT IS FURTHER ORDERED, That the DBS application of Continental Satellite Corporation IS GRANTED IN PART to provide service from two or more satellites delivering 11 channels to each half of the continental United States, or from one or more satellites delivering 11 channels to the entire continental United States, as described in this Order and its application, File No. DBS-87-01, subject to the following conditions and provisions:

(a) This grant does not include launch and/or operational authority for any phase of the proposal;

(b) This grant does not include the assignment of frequencies or orbital positions for any satellite; and

(c) The applicant must proceed with the construction of its system with due diligence, as defined in Section 100.19 of the Commission's Rules (47 C.F.R. §100.19); and

(d) The applicant will receive reservations for additional channels, up to the total number of half-CONUS channels necessary to fulfill the proposal in its application, if DBS allocations are surrendered by other permittees or canceled by the Commission.

65. IT IS FURTHER ORDERED, That the DBS application of EchoStar Satellite Corporation IS GRANTED IN PART to provide service from two or more satellites delivering 11 channels to each half of the continental United States, or from one or more satellites delivering 11 channels to the entire continental United States, as described in this Order and its application, File No. DBS-88-01, subject to conditions and provisions (a), (b), (c), and (d) in paragraph 64, above.

66. IT IS FURTHER ORDERED, That the DBS application of DIRECTSAT Corporation IS GRANTED IN PART to provide service from two or more satellites delivering 11 channels to each half of the continental United States, or from one or more satellites delivering 11 channels to the entire continental United States, as described in this Order and its application, File No. DBS-88-02, subject to conditions and provisions (a), (b), (c), and (d) in paragraph 64, above.

67. IT IS FURTHER ORDERED, That the Request for Extension of Time filed by Direct Broadcast Satellite Corporation IS DENIED and its outstanding conditional construction permit IS CANCELLED, and that its pending DBS application IS GRANTED IN PART to provide service from two or more satellites delivering 11 channels to each half of the continental United States, or from one or more satellites delivering 11 channels to the entire continental United States, as described in this Order and its application, File No. DBS-88-08, subject to conditions and

provisions (a), (b), (c), and (d) in paragraph 64, above, and the condition that DBSCorp file within thirty days either an Equal Employment Opportunity Program that 1) sets out the corporation's general policy with respect to EEO and affirms that the corporation has adopted an EEO program; 2) designates the official who will have responsibility for implementing the corporation's program; 3) sets out how the corporation's EEO program will be disseminated to present and future employees; 4) lists specific recruitment sources, including minority and women's organizations, educational institutions and media that the corporation will use to attract qualified minority and female applicants whenever a job opportunity occurs, or an amendment to its application stating clearly whether it intends to operate as a broadcaster on any channel authorized and explaining its intended manner of operation on all channels, consistent with that stated intention.

68. IT IS FURTHER ORDERED, That the application for modification of DBS facilities of Advanced Communications Corporation IS GRANTED IN PART to provide service from additional satellites as required, to deliver 11 additional channels (27 total) to each half of the continental United States or 11 additional channels (27 total) to the entire continental United States, as described in this Order and its applications, File No. DBS-88-05-MP, subject to conditions and provisions (a), (b), (c), and (d) in paragraph 64, above; the condition that Advanced file within fifteen days the required filing fee for a major modification application in the DBS service, as provided in paragraph 36, *supra;* and the condition that Advanced file within thirty days either a list of specific recruitment sources, including minority and women's organizations and specific media which have significant circulation or are of particular interest to minorities and women, that the corporation will use to attract qualified minority and female applicants whenever a job opportunity occurs, or an amendment to its application stating clearly whether it intends to operate as a broadcaster on any channel authorized and explaining its intended manner of operation on all channels, consistent with that stated intention.

69. IT IS FURTHER ORDERED, That the application for modification of DBS facilities of United States Satellite Broadcasting Company, Inc. IS GRANTED to provide service from two satellites each to deliver eight channels to half of the continental United States, with the first satellite launched and operational to deliver eight channels to the entire continental United States until such time as the second satellite is operational, as described in this Order and its application, File No. DBS-88-06-MP, subject to the condition that USSB file within thirty days a list of specific recruitment sources, including minority and women's organizations, educational institutions with significant minority and female enrollments, and media which have significant circulation or are of particular interest to minorities and women that the company will use to attract qualified minority and female applicants whenever a job opportunity occurs.

70. IT IS FURTHER ORDERED, That the application for modification of DBS facilities of Hughes Communications Galaxy, Inc. IS GRANTED IN PART to provide service from additional satellites as required, to deliver 11 additional channels (27 total) to each half of the continental United States or 11 additional channels (27 total) to the entire continental United States, as described in this Order and its applications, File No. DBS-88-07-MP, subject to conditions and provisions (a), (b), (c), and (d) in paragraph 64, above, and the condition that Hughes file within thirty days either an Equal Employment Opportunity Program, specifically designed for Hughes' DBS operations, that 1) sets out the corporation's general policy with respect to EEO and affirms that the corporation has adopted an EEO program; 2) designates the official who will have responsibility for implementing the corporation's program; 3) sets out how the corporation's EEO program will be disseminated to present and future employees; and, 4) lists specific recruitment sources, including minority and women's organizations, educational institutions and media that the corporation will use to attract qualified minority and female applicants whenever a job opportunity occurs, or or an amendment to its application stating clearly whether it intends to operate as a broadcaster on any channel authorized and explaining its intended manner of operation on all channels, consistent with that stated intention.

71. IT IS FURTHER ORDERED, That Dominion Video Satellite, Inc., United States Satellite Broadcasting Company, Inc., Hughes Communications Galaxy, Inc., and Advanced Communications Corporation SHALL SUBMIT, within sixty days of the date of this Order, additional information regarding the status of their satellite construction contracts and timetables, as provided in paragraph 60, above.

72. IT IS FURTHER ORDERED, That Dominion Video Satellite, Inc. SHALL SUBMIT, within twenty days of the release of this Order, its specification of the eight channels it wishes to retain at 119^0W and its request for eight channels at a western orbital location.

73. IT IS FURTHER ORDERED, That Hughes Communications Galaxy, Inc. SHALL SUBMIT, within thirty days of the release of this Order, its specification of the sixteen channels it wishes to retain at 101^0W and its request for sixteen channels at a western orbital location.

74. IT IS FURTHER ORDERED, That the request of Advanced Communications Corporation for an allocation of all thirty-two channels at 101^0W IS DISMISSED without prejudice.

75. IT IS FURTHER ORDERED, That the request of Hughes Communications Galaxy, Inc. for authorization to operate its DBS facilities with channels that are 27 MHz wide IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Orbital Broadcasting Company also filed an application on that date (DBS-88-03), but voluntarily withdrew the application on June 19, 1989.

[2] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; similarly, those which cover the entire continental United States are referred to as "full-CONUS" signals.

[3] *See, e.g., Satellite Syndicated Systems, Inc.*, 99 FCC2d 1369, 1378 (1984).

[4] The Commission has also authorized quarter-CONUS signals, and will continue to do so where such authorization is appropriately requested. However, such delivery is apparently considered obsolete, and there appear to be no present plans to operate in such a mode. Quarter-CONUS signals do not affect the various analyses in this Order, and will not be further mentioned in this Order. The Commission also once authorized a limited number of full-CONUS signals to be operated at high power by the first DBS entity (Satellite Television Corporation), at a time when few DBS applicants existed and few operational standards had been established. *CBS, Inc.*, 99 FCC2d 565, 574 (1984). STC surrendered its DBS permit on February 9, 1988, and the permit was canceled on February 19, 1988; the Commission has made no additional full-CONUS authorizations since that time. The propriety and efficacy of full-CONUS authorizations is further discussed in paragraphs 9, 10, below.

[5] Such allocations could still be useful for other purposes, as discussed in paragraph 10, below.

[6] *E.g.*, if two eastern channels are used to provide one eastern half-CONUS and one western half-CONUS signal, two western channels are spent as well, while only one nationwide channel of service is delivered. However, if the same two eastern channels are each used to provide eastern half-CONUS service and two corresponding western channels are used to provide western half-CONUS service, two nationwide channels of service are delivered. The overall impact of such allocations would be considerable. The locations 101 ^{0}W, 110^{0}W, and 119^{0}W collectively have 96 channels for DBS service (32 channels at each of three locations). If half of those channels were used for eastern half-CONUS service and half for western half-CONUS service, there would be 48 channels of nationwide DBS service provided from those locations. At the same time, three of the four western orbital locations would stand useless for purposes of providing part of a nationwide DBS service, as they would be suitable solely for western service, with only one remaining location available for providing a complementary eastern service (61.5^{0}W). Adding the 32 channels of nationwide DBS service delivered from that remaining east/west pair, a total of 80 channels could be delivered nationwide. However, if western half-CONUS service is prohibited from eastern locations, those three eastern orbital locations, in conjunction with three western locations providing complementary western half-CONUS service, would be parts of systems which could provide 96 nationwide DBS channels. Adding the 32 channels of nationwide DBS service delivered from the remaining east(61.5^{0}W)/west pair, a total of 128 channels could be delivered nationwide.

[7] Several of the DBS entities supported the proposition adopted here, prohibiting western half-CONUS service from the eastern orbital locations under current circumstances. Those that opposed the proposition appeared to object narrowly to a complete prohibition of all western United States service from an eastern location, which the DBS allocation policy would not do under the provisions stated here. Western service as a component of a full-CONUS signal will be permitted from eastern orbital locations, as further discussed in paragraphs 9, 10, below.

[8] Hughes submitted a study on January 17, supplemented on January 31, 1989, which will be referred to as the NASA study, and USSB submitted a study on January 17, 1989, which will be referred to as the Telesat study. These studies use computer models to predict the intereference levels at the test points established in the Region 2 Plan which would occur from simultaneous full-CONUS transmissions at 101^{0}W, 110^{0}W, and 119 ^{0}W, and also the additional cumulative effect of operation from 61.5^{0}W. The computer models are derived from those used by the International Frequency Registration Board ("IFRB") in establishing the Region 2 Plan and its parameters. The studies assume elliptical beams and a full-CONUS boresite power of 56 dBW. Based on these worst case assumptions, interference consequences which are potentially severe enough to require the agreement of another administration for a Plan modification occur at only two or three test points (out of nearly 16,000, according to Hughes' estimate). At several other test points, the interference increases are within the limits which would permit unilateral Plan modification. As stated above, these results are based on worst case assumptions regarding power levels and beam parameters, necessitated by capability limitations of the computer programs of NASA and Telesat. It is likely that when actual systems are modeled as specifically proposed, the threshold criteria for the simpler and more desireable Interim Systems notification procedures may be met without requiring Plan modification or consent from other administrations. In any case, these calculations will be made when final operational plans are established by DBS operators, and any appropriate action can be taken at that time.

[9] It is arguable whether an adequate full-CONUS signal can be delivered from 61.5^{0}W. It will be left to any operator at that location to make such a determination.

[10] The three orbital locations can provide a total of 96 channels of DBS service nationwide when operated full-CONUS (32 channels at each of three locations). Adding the 32 channels of nationwide service deliverable from 61.5^{0}W paired with channels from a western location (or from 32 full-CONUS channels at 61.5^{0}W), a total of 128 channels of DBS service could be delivered nationwide. This provides for the same number of nationwide channels as if allocations were made for half-CONUS signals only in east/west pairs. (Compare n. 6, *supra*.)

[11] Authorization of full-CONUS signals is not a concession to lower power flux density levels. The requirement that power levels be adequate for reception by relatively small and inexpensive receive equipment remains a key ingredient of DBS service. *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977, 979 (1986); *Satellite Syndicated Systems, Inc.*, *supra* at 1379-84. Full-CONUS signals cover roughly twice as much area as half-CONUS signals, and thus require roughly twice the power input to maintain the same power flux density at points on the ground. *I.e.*, if a half-CONUS channel would require 100 watts to produce a 51 dBW signal; a full-CONUS channel would require roughly 200 watts to produce a 51 dBW signal. Thus two half-CONUS signals and one full-CONUS signal require roughly the same amount of total power to be produced in and delivered from orbit. Consequently, conversion to full-CONUS channels will not reduce appreciably the total amount of power that must be generated and delivered, or the consequent amount of space platform capacity that is required for each nationwide DBS channel. However, the number of discrete satellites could possibly be reduced if satellites can be built sufficiently large to provide the double power capacity required for full-CONUS operations, and one large satellite may be easier and cheaper to design, build, launch and operate than two smaller satellites. Even if double-powered satellites are not available, and two satellites with full-CONUS channels remain necessary to deliver the same service that otherwise would have been delivered from two satellites with half-CONUS channels, there is some efficiency involved in designing and building multiple satellites (possibly including back-up capacity) for operation in similar configurations from the same orbital location. There can be other operational economies as well, of various degrees of significance, such as reduction in terrestrial facilities, and increased flexibility in normal and emergency operations. In any event, as there appears no adverse consequence to the public or other operators, each DBS operator will be permitted to make its own decision as to its mode of signal delivery.

[12] In conjunction with this Order, a Notice of Proposed Rule Making is being adopted (*Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service)*, FCC 89-258, adopted August 2, 1989) to consider the provision of alternate services from the western DBS orbital locations in conjunction with full-CONUS DBS service from the eastern DBS orbital locations, as well as the possible impact of full-CONUS signals on potential DBS service to Alaska and Hawaii.

[13] 47 C.F.R. §100.13(b); *Hughes Communications Galaxy, Inc.*, Mimeo No. 6574 (Mass Media Bureau, August 23, 1985); *Satellite Television Corporation*, 98 FCC2d 339, 342 (1984); *Processing Procedures Regarding the Direct Broadcast Satellite Service ("DBS Processing Procedures")*, 95 FCC2d 250, 253 (1983); *DBS Order, supra* at 719. Specific allocations are awarded according to a party's selection from those available at the time the party demonstrates the first part of its due diligence in construction (47 C.F.R. §100.19(b)) by executing an acceptable contract for the construction of the authorized satellites.

[14] Based on the evidence available, it appears entirely possible that any other entity, including those permittees granted today, could initiate service prior to Hughes or Dominion, if they were to proceed promptly, as expected, with construction and launch of their systems.

[15] Hughes' Construction Permit and Launch Authority states: "Upon expiration of the license term, this authorization may be modified to provide for [western service] Antenna Beams . . . to originate from another DBS-designated position, depending on the circumstances at that time." The Order granting Hughes' conditional construction permit included the specific caveat that "[s]hould Hughes request . . . [a] single orbital position for both of its [half-CONUS] satellites, such a proposal can be approved . . . However, Hughes is explicitly advised that [the Commission recognizes the inefficiency of such an allocation] . . . . Accordingly, the Commission will reevaluate the demand for DBS orbit/spectrum resource, the availability of alternative channels, and the relative advantages and disadvantages of colocation compared to a return of those same channels to eastern service at any time Hughes' or another similar operator's renewal application is tendered." *Satellite Syndicated Systems, Inc., supra* at 1379 (1984). Dominion's Construction Permit and Launch Authority, originally issued on July 18, 1984, and reissued on September 19, 1985 with additional channels, explicitly stated that Dominion's authority for western service from 119^0W could be modified or rescinded if necessary to comply with the interference constraints of the Region 2 Plan. Although the occasions explicitly anticipated for modification in these reservations are somewhat different from those here, the potential for involuntary modification is clear, and any change in circumstances is due, in greatest measure, to the parties' delay in launching their systems. Were these parties able to meet the terms of their conditional permits, we would be far more constrained in taking action to modify their permits. When Dominion's recent request for extension of time was granted so that it could maintain its permit, it was put on specific notice that its technical parameters at variance with the Region 2 Plan could be modified. *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd 6858, 6861 at n. 23 (1988). Hughes' most recent progress report clearly indicates that it will not be in a position to launch within the time required by the due diligence requirement of its current permit.

[16] In accordance with their original order of precedence, Dominion will be permitted to make the first request, and Hughes the second; Dominion will serve Hughes with a copy of its allocation request. These requests must take into account the allocations granted previously to USSB and the allocations granted in conjunction with this Order to Advanced (see n. 40, *infra)*. Dominion's and Hughes' requests will be considered, of course, only if the supplemental information regarding construction contracts, required in paragraphs 61, 71, *infra*, pursuant to *United States Satellite Broadcasting Co., Inc.*, 3 FCC Rcd 6858 (1988), demonstrates that those parties are diligent in the construction of their satellites.

[17] The only other efficient design option that would have been available to Dominion under an authorization for colocated eastern and western half-CONUS signals would be to locate all transponders on a single sixteen-channel satellite.

[18] Dominion also claims ownership of one of the two satellites originally built for Satellite Television Corporation, the first DBS permittee. That satellite, reportedly near completion, has three 200-watt channels, suitable for full-CONUS operation. Dominion contends that the paired-only requirement would make it impossible to incorporate this satellite into its plans, and would thus delay the introduction of DBS service. We note in this regard that Dominion has repeatedly claimed that it had purchased or was purchasing one or both of the STC satellites since August 7, 1986, and has yet to provide any evidence of ownership of any kind or degree. This claim, then, provides no basis upon which to make an allocation decision. Moreover, even if Dominion were actually to obtain an STC satellite to provide three nationwide channels, the same measure of inefficiency, if any, would be introduced regardless of the paired-only limitation on half-CONUS signals. The remainder of Dominion's allocation would be serviced by two (smaller) five-channel satellites operating half-CONUS, whether colocated or not, or by one five-channel satellite operating with full-CONUS signals. Dominion would be prevented from using a single satellite with ten half-CONUS signals (five east, five west), but an essentially similar satellite could be built with five full-CONUS channels.

[19] At one point, Hughes seems to claim that 32 full-CONUS channels are essential to its business plan. If that is the case, Hughes has pursued the appropriate course by seeking an additional allocation via modification of its authorization.

[20] Hughes' subject application entitles it to obtain additional channels, up to a cumulative total of thirty-two full-CONUS allocations, if any two of the parties granted conditional permits in this Order fail to begin construction or complete contracting for construction within one year to meet the due diligence requirement. See paragraphs 54, 56, below.

[21] This is the first part of the "due diligence" requirement. 47 C.F.R. §100.19.

[22] DBSCorp's request for extension of time is hereby denied and its previous permit canceled. This new application was effectively noted for the public in the "B-list" Public Notice, Report No. DBS-5B, May 3, 1988, although not assigned a file number at that time.

[23] Advanced's allocation request has been pending Commission computer analysis capability, which has recently been acquired. Advanced has also made other allocation requests, which include western half-CONUS service from eastern orbital locations, and are thus at variance with the DBS orbital allocation plan, and they will be disregarded. One of Advanced's alternate allocation requests, for all thirty-two channels at 101^0W, is discussed at paragraphs 15 - 16, *supra*.

[24] Eight of the channels at 110^0W are held by USSB, whose authorization was recently extended into December, 1992, and are not currently available to Advanced, or to any other party. *United States Satellite Broadcasting Co., Inc.*, 3 FCC Rcd 6858 (1988).

[25] USSB had earlier requested reassignment of its 148^0W satellite to 110^0W, but withdrew that request.

[26] One satellite is currently authorized to carry even channels and the other to carry odd channels, in accord with the Region 2 Plan. Hughes now requests that channels 1, 2, 5, 6, 9, 10, 13, 14, 17, 18, 21, 22, 25, 26, 29, and 30 be assigned to one satellite, with the other channels on the other satellite.

[27] Although Hughes stated its belief that its proposed modification is a minor amendment, it nonetheless submitted a filing fee with the amendment "should it be necessary."

[28] Several parties have challenged AMST's standing. Given the disposition of this matter, the question of standing need not be further addressed.

[29] *United States Satellite Broadcasting Co., Inc.*, 1 FCC Rcd 977 (1986), *recon. denied*, 2 FCC Rcd 3642 (1987). This Order provides that DBS licensees may use their DBS facilities for services other than direct-to-home video services on a limited basis under certain circumstances.

[30] 47 C.F.R. §100.51 provides in pertinent part: "(a) General policy. Equal opportunity in employment shall be afforded [by] all licensees or permittees of direct broadcast satellite stations licensed as broadcasters to all qualified persons, and no person shall be discriminated against in employment . . . ."

[31] It must be noted that even in the absence of a specific rule requiring particular affirmative action recruitment activities, all DBS operators are governed by federal statutes regarding discrimination in employment practices.

[32] From the contested applications, only USSB's intention regarding its utlimate mode of operation is clear. USSB has stated that it is "committed to providing advertiser supported television programming to all residents of the United States. USSB Application at 5. Advanced, in its Opposition to NBMC's petition to deny, states that it will operate on a subscription basis and refers to a statement to that effect in its original application. That original application, however, contemplated a system of a different technical configuration with far fewer channels that the system authorized as a result of this Order. Hughes' opposition pleading similarly states that it has already been authorized to selectively lease its transponders on a non-common carrier basis. Hughes' proposed system has also evolved considerably since that time. DBSC's proposed system has also increased in size since its original system was projected to be operated on a common carrier basis. None of these applicants has made a specific representation which necessarily precludes its operation as a broadcaster on any of its channels of operation which are under consideration in this Order. In the absence of such a representation regarding its intended mode of operation, and an explanation of its intended manner of operation on all channels consistent with that claim, full compliance with the EEO rules will be required.

[33] A reply to Tempo's opposition to the petitions to deny was late-filed by the Motion Picture Association of America ("MPAA"), which had not filed a petition to deny. It will be considered like an informal objection under Section 73.3587 of our rules. (47 C.F.R. §73.3587.) All of the arguments raised are fully encompassed by the petitions to deny considered here, and MPAA's objection will not be further addressed individually.

[34] BTC-880120EA, BTCCT-880120KP, and BTCCT-880216KJ for transfer of stations WTPO(AM), Conyers, Georgia, WIHT(TV), Ann Arbor, Michigan, and KGCT-TV, Tulsa, Oklahoma were later withdrawn, and those stations were transfered to another entity.

[35] *Central Telecommunications, Inc. v. TCI Cablevision*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied* 480 U.S. 910 (1987).

[36] *See* paragraphs 54 - 56, below, regarding the pro-rata reduction of all applicants' requests for facilities.

[37] The continued interchangeability of DBS allocations is discussed in paragraph 11, *supra*. Specific orbit/channel allocations are made for each permittee upon its submission of a showing that it has satisfied the first part of the due diligence requirement (47 C.F.R. §100.19(b)) by beginning construction or completing contracting for construction of its satellites.

[38] *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd 6858 (1988).

[39] It may be notable that two current permittees have systems comprised of 16 half-CONUS channels.

[40] There are a total of 256 half-CONUS orbit/channel allocations which can be made from the United States' orbital locations assigned under the Region 2 Plan (eight orbital locations with thirty-two channels each). Two permittees already are assigned or reserved thirty-two channels each and two others are already assigned sixteen channels each, for a total of 96 half-CONUS orbit/channel allocations already assigned, leaving 160 available.

[41] Six individual half-CONUS channels will remain unallocated. In view of the requirement to allocate half-CONUS channels in pairs and the existence of seven applicants, these channels cannot be allocated equitably at this time. They will be allocated if and when additional channels become available for allocation or the number of applicants from this group seeking additional channels under their instant applications is reduced to the point that equitable distribution is possible.

[42] Advanced's most recent allocation request consistent with the allocation policy, submitted November 18, 1986, has been analyzed and found grantable. Consequently, the Mass Media Bureau will send under separate cover an instrument of authorization allocating to Advanced the odd-numbered channels at 110^0W and at 148^0W.

[43] Eleven pairs of half-CONUS channels are held in reserve, pending final action on Tempo's application.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Applications in the Direct Broadcast Satellite (DBS) Service for Construction Permits for New Systems and for Modification of Construction Permits for Authorized Systems, Filed by the Fifth Round of DBS Applicants, and Petitions to Deny Certain of Those Applications.

I write separately to explain my views on potential concentration of control in DBS.

We have no rules governing agreements between DBS permittees to acquire or merge channel allocations. I agree with my colleagues that it would be premature to adopt them at this stage. Nevertheless, I would be receptive to adopting rules if the DBS industry develops.

Since first authorizing DBS service in 1982, the Commission has purposely imposed the lightest possible regulation. The cost of providing service is extremely high; the prospects for DBS are uncertain. An elaborate regulatory structure would further add to the cost of entering what is still a risky business.

Our DBS policies seek to provide incentives to make the huge capital investments required to introduce service. We allocate channels conditionally, based on a requirement to act diligently in proceeding toward a

launch. We assign specific channels, on a first-come, first-served basis, only to those applicants that demonstrate they have exercised due diligence.

At this stage, we also permit applicants to combine assignments through merger or buyout, subject to Commission approval. We have declined to adopt rules limiting the number of channels that any one permittee may obtain. We have no experience on which to predict how many channels may be required to make a DBS system economically feasible. It would be premature to adopt a rule providing, for example, that no applicant may accumulate more than 64 half-CONUS channels.

For now, we will review merger or buyout agreements on a case-by-case basis. In reviewing those agreements, we will be guided in part by the effect of the combination on competition in the DBS business and, more generally, in the video programming business.

I remain committed to promoting diversity and competition throughout the mass media. If DBS matures, I would be interested in adopting rules to promote those values. Yet at this point, I would rather take a permissive approach to DBS than devise a perfectly competitive model on paper that may bear no relation to the economic challenges facing the intrepid DBS pioneers.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-355

In re

Potential Uses of Certain Orbital
Allocations by Operators in the
Direct Broadcast Satellite Service

NOTICE OF PROPOSED RULE MAKING

Adopted: August 2, 1989; Released: August 15, 1989

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioner Dennis issuing a separate statement.

1. This Notice is issued in conjunction with *Continental Satellite Corporation*, FCC 89-257, also adopted today, to obtain comment on certain specific policies and requirements relevant to the provision of service offerings in the Direct Broadcast Satellite (DBS) service. This Notice solicits comment on (1) policies and/or requirements to govern the permissible uses of the DBS frequencies from the orbital locations 148°W, 157°W, 166°W, and 175°W, and (2) requirements for DBS operators to provide service or specified levels of service to particular geographic or politically defined areas. To the extent deemed appropriate, we intend to resolve the issues raised here prior to the award of any specific orbit/channel allocations which may be dependent on the determinations made.[1]

Service From Western
DBS Orbital Locations

2. In *Continental Satellite Corporation*, we require that the applicants' DBS channels be allocated in east/west pairs, tentatively approve provision of DBS service via full-CONUS signals, and grant a number of conditional construction permits for DBS systems. In conjunction with the discussion in that Order of the technical viability of service via full-CONUS signals, it is noted that the most westerly DBS orbital locations may no longer be necessary to the provision of full continental DBS service, and would thus be available for the provision of other services. *Id.* at para. 10. Although none of the DBS parties has indicated, as yet, specific plans regarding use of the DBS western orbital locations in conjunction with full-CONUS signals from the DBS eastern locations, we wish to solicit comment on the issues which may arise and consider what action, if any, may be appropriate at this time.

3. It is our initial inclination that any use to which the western DBS orbital locations can be put to practical advantage should be permitted, and that proposals by DBS operators to provide additional services from their western orbital locations, consequent to actual operation with full-CONUS signals from their eastern locations, generally should be authorized, without subjection to a process that involves competing applications. We have historically stressed flexibility as the hallmark of our regulation of the DBS orbit/spectrum resource. *Report and Order* in Gen. Docket No. 80-603, ("*DBS Order*"), 90 FCC2d 676, 682 (1982); *CBS, Inc.*, 92 FCC2d 64, 68 (1982). The wisdom of, and the benefits to be derived from, this approach are evident in this situation. If valuable alternate uses of the western orbital locations are practical, authorization of such additional uses will provide the incentive for DBS operators to achieve this more intensive use of the orbit/spectrum resource, the benefit of which will accrue directly to the public. In 1986, the Commission took a more restrictive view of uses of the DBS spectrum for services other than those related to direct-to-home video entertainment and information. The circumstances presented in that consideration are critically different from those before us now. In 1986, the Commission was considering the impact of alternative service on the ultimate goal of achieving the direct-to-home video services for which the spectrum was primarily allocated, and restrictions were imposed on use of the DBS spectrum to ensure that the service for which the spectrum was dedicated would be provided. *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977 (1986). We did not have before us the possibility presented here that the spectrum could be utilized more intensively and flexibly without diminishing the provision of DBS service on a national basis. The additional uses now contemplated would be authorized only in the situation that full-CONUS signals are already providing the same number of channels of national DBS service that would be provided in the absence of any such additional use.

4. One issue raised by this more expansive view of the activities to be permitted is whether such authority should be granted to existing DBS permittees/licensees with no provision for the consideration of competing applications. We tentatively propose not to accept applications from new parties for the provision of service from the western DBS orbital locations. We believe that this will best serve the public interest and is well within our authority to adopt eligibility requirements.[2] Our conclusion is based on the following reasoning, upon which we seek comment. First, as stated above, we propose to permit such service only in conjunction with the active provision of DBS service via full-CONUS signals from a complementary eastern orbital location. Unless these interdependent operations are licensed to the same entity, we may be unable to ensure the continued primacy of DBS service.[3] Moreover, granting such authority to existing operators would appear to increase substantially the likelihood that western DBS orbital locations will be used in the most productive manner. Permitting a DBS licensee to retain its western allocation for alternative services when it provides DBS service via full-CONUS signals will provide an incentive to achieve these efficiencies by appropriately rewarding those parties whose technical endeavors have made the additional services possible. It would also provide them with the maximum flexibility in providing DBS service, and they could elect to provide additional video services on a (western) regional basis, and would permit them to experiment with their service offerings and system configuration with the assurance that they could return to pairs of half-CONUS signals, if desired. Finally, the grant of such authority may be an impetus to further investor interest if it is seen to reduce investors' risk, and may thus enhance support for DBS service so that it may

more quickly achieve the full potential for service to the public that we envisioned when we originally established the allocation.

5. We believe these public interest benefits outweigh any benefits that might be afforded by providing for a greater pool of applicants for alternative operations on this residual orbit/spectrum resource. Moreover, we note, this residual orbit/spectrum resource will not even be available for possible use by others unless existing DBS permittees are able to surmount the difficulties of providing full-CONUS service from their eastern locations, and have appropriate incentives to do so. In these circumstances, we tentatively conclude that both equitable and public interest considerations support a policy of allowing existing DBS licenses to use this residual orbit/spectrum resource for both primary DBS use and alternative services. Comments are invited on this tentative conclusion and its supporting rationale. Commenters who oppose this tentative conclusion should also address the question, in conjunction with those posed in paragraph 6, below, of whether we should limit any filing of applications by parties other than DBS permittees or licensees, to any specific groups or users.

6. It is our initial view that it is not necessary or appropriate to establish separate licensing requirements for alternative services offered on an ancillary basis by DBS licensees from their western orbital locations. We seek comments on this view and on any potential regulatory conflicts or concerns and how they should be addressed. Commenters should specifically address whether different or additional application or notification requirements should be imposed or considerations made prior to authorization of use of the DBS western orbital locations for service other than that related to the provision of direct-to-home video services, and whether different or additional operating requirements should apply, particularly regarding the potential for interference which may be introduced by alternate services.[4] What technical constraints may be appropriate, *e.g.*, maximum or minimum power limitations, channel bandwidth or configuration, signal beam shapes, and signal formats?[5] Underlying these questions is an uncertainty as to the actual service offerings which may evolve and the forms they may take. Thus, a question basic to the others raised here is the extent to which these issues can or should be addressed or resolved at this time. Parties are invited to discuss the services they view as likely to be provided and whether any concerns unique to a specific service may require closer examination before that service is authorized. In sum, parties' comments should specifically include their views regarding 1) potential alternative uses of western DBS orbital locations; 2) whether, and what, policies or restrictions currently applicable to other satellite services should apply to alternative uses of the DBS allocation; 3) whether alternative uses themselves should be limited in some fashion; and 4) whether alternative uses should be considered only on a case-by-case basis.

7. Our tentative views on the above matters, regarding the use of and licensing for subsidiary or ancillary services, can be likened to our approach to such services in other areas. We have often emphasized the desirability of encouraging licensees to increase the intensity and efficiency of their use of spectrum by finding new and additional uses of that spectrum. On a number of occasions, we have authorized broadcasting stations to provide secondary or subsidiary services on their frequency allocation that are not necessarily related to the primary service or signal of the station. We have authorized radio and television stations to provide such services as a way to increase spectrum use and supplement their income. For example, the Commission has authorized FM broadcast stations to use their subcarrier or subsidiary carrier authorization (SCA) to provide a variety of services, broadcast-related and otherwise, including paging, data transmission, and dispatch services.[6] Television stations are also authorized to use their aural baseband for nonbroadcast as well as broadcast-related uses.[7] We have also authorized licensees in the Instructional Television Fixed Service (ITFS) to use excess capacity on their systems for non-ITFS purposes, noting that such use might be a source of additional revenue, enhancing the primary ITFS service, as well as increasing the use of the spectrum.[8] In all instances, we have attempted to minimize the additional regulatory requirements, and we propose to apply similar analysis to DBS licensees' use of orbital locations.

Minimum Service Requirements

8. In response to a staff letter of inquiry, addressed to all DBS permittees and applicants regarding DBS allocation requirements and practices,[9] one party suggested that permitting DBS service to originate exclusively from the eastern orbital locations could reduce the potential for service to Alaska and Hawaii.[10] Although we have not previously required any particular level of service to any particular geographic or politically defined area, and all DBS applications granted to date have been granted without regard to their specific coverage areas or patterns, it was assumed that the benefits of DBS service would be available throughout the nation. *DBS Order*, *supra* at 680 - 84. We would be seriously concerned if our actions could result in a meaningful reduction in service to Alaska and Hawaii. In this regard, our action to permit full-CONUS service from eastern DBS orbital locations could conceivably have an effect on the extent of DBS service to Alaska and Hawaii. Moreover, our proposal to correspondingly permit alternate uses of western DBS orbital locations could further discourage DBS service to these two states. Therefore, we wish to consider the potential effect of either or both of these actions on DBS service to these two states. To the extent that such service could be significantly affected by our actions, we wish to consider the public interest ramifications of requiring some minimum service level to all regions of the U. S., including especially Alaska and Hawaii. Interested parties are invited to address the variety of technical and policy issues engendered by this issue.

9. We seek comment first on the technical and economic effects that full-CONUS service would have on service to Alaska and Hawaii. Specific spot beams, separate from the primary signal beams would have to be dedicated for service to Alaska or Hawaii, regardless of whether DBS service is delivered from pairs of half-CONUS signals or individual full-CONUS signals. Therefore, we request information as to what extent service to Alaska and/or Hawaii would be affected by whether the primary mode of operation is via half-CONUS pairs or full-CONUS signals? Thus, in what way and to what extent could DBS service be provided to Alaska and/or Hawaii from the eastern DBS orbital locations, without consideration of the constraints in the Region 2 Plan? (Such an analysis should include the likelihood that 61.5°W will be paired with a western orbital location to

provide national service.) To what extent is service to Alaska likely to be affected for any or all points of origination or system configurations, due to the geographic proximity of the Soviet Union in Region 1?[11]

10. We also seek comment on the implications of these technical and economic effects on the likelihood or level of service to Alaska and/or Hawaii by the widespread use of full-CONUS signals in the absence of minimum service requirements. Are operators necessarily more likely to provide a separate signal (at the cost of power from their primary signal(s)) if in a two-location half-CONUS paired configuration than if in a single-location full-CONUS configuration? If so, to what extent?

11. In addition, we seek information as to what extent the provision of alternate services from western slots would affect service to these two states. What other considerations may come into play, and what are their likely effect on service to Alaska and/or Hawaii? Even if full-CONUS service is restricted, what is the likelihood that DBS service will eventually originate from 166^{0}W and 175^{0}W, the two locations specifically provided for service to Alaska and Hawaii in the Region 2 Plan?

12. In light of the unique circumstances presented by Alaska and Hawaii, combined with the considerations mentioned above, we seek comment on what provision(s) should be imposed relating to service to Alaska and Hawaii, and whether such a specific requirement would have to include or would necessarily implicate minimum or relative service levels to all other areas of the U.S. and its territories.[12] Would a rule requiring related levels of service throughout the country prohibit a DBS operator from providing channels of DBS service to the western U.S. in addition to channels it may provide on a full-CONUS basis? Commenters should address themselves to how particular requirements would affect the viability or likelihood of DBS service via full-CONUS signals, and how such requirements would generally affect the likelihood of the initiation or continued viability of DBS service for the remainder of the country. If specific service requirements are deemed necessary or appropriate, how can they best be effectuated, or at least encouraged? Would such requirements be best attached to overall system configuration or operation, or strictly as a condition of use of certain orbital locations? (*E.g.*, should 166^{0}W and/or 175^{0}W be reserved partially or exclusively for service to Alaska and Hawaii?) We are especially interested in comment on the following two possible requirements which could attach to use of these two orbital locations: 1) requiring primary DBS service to Alaska and Hawaii as a condition precedent to alternative service authority at these locations; and, 2) treating alternative services at these locations as secondary to primary DBS service in some fashion. What would be the effect of any such requirement on the equivalency of orbital locations and the consequent effect on our application processing and allocation practices? (*See Continental Satellite Corporation, supra* at para. 11.)

Administrative Matters

13. Authority for this proceeding is contained in Sections 1, 4(i) and (j), 303, 308, 309 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **October 13, 1989,** and reply comments on or before **November 13, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in its decision.

14. In accordance with the provisions of Section 1.419 of the Commission's rules, formal participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments must be clearly marked with "MM Docket No. 89-355" and sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

15. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda Period. *See generally*, 47 C.F.R. §1.1206(a). The Sunshine Agenda Period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. §1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. §1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. §1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. §1.1206.

16. *Regulatory Flexibility Act Initial Analysis.* Pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, it is hereby certified that the proposals herein, if adopted, will not have a significant economic impact on a substan-

tial number of small entities, as only a small number of entities are potentially affected by the proposals, and most of those affected will not be small entities.

17. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

18. For further information on this proceeding, contact Bruce A. Romano, Mass Media Bureau, (202) 632-9356.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In *Continental Satellite Corporation*, several DBS applicants were given general reservations for channels, along with their conditional construction permits. Specific orbital locations and channels are awarded to each permittee, upon its request, after it has satisfied the due diligence requirement that it begin construction or complete contracting for construction of its satellite system. (47 C.F.R. §100.19(b)). *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC2d 250, 253 (1983).

[2] *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[3] Alternative services from a western DBS orbital location, in the absence of the complementary full-CONUS DBS service from an eastern location, would not be consistent with the underlying allocation decision for the 12.2 - 12.7 GHz frequency band. (*See DBS Order*, *supra* at 680 - 683.) Such a situation is best prevented if the same entity is responsible for both operations.

[4] In this regard, it may be appropriate to permit pre-existing terrestrial licensees to maintain their status as primary users vis-a-vis any operations in the DBS spectrum from the western DBS orbital locations that would constitute alternative use of the allocation, and comments are invited as to the propriety and utility of such a provision. (*See DBS Order*, *supra* at 697 - 704.)

[5] An important consideration to be included here is the impact, if any, of such uses on the United States' treaty obligations, particularly if those uses do not follow the DBS operational parameters assumed for the Region 2 Plan.

[6] *First Report and Order* in BC Docket No. 82-536 (Subsidiary Communications Authorization), 48 FR 28445, 53 RR2d 1519 (1983).

[7] *Second Report and Order* in Docket No. 21323 (Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters), 49 FR 18100, 55 RR2d 1642 (1984). The vertical blanking interval of a television signal has also been authorized not only for teletext services, related or unrelated to broadcast programs or activities, but also for such purposes as data transmission, computer software delivery, and paging. *Report and Order* in MM Docket No. 84-168 (Data Transmission Service on the TV Vertical Blanking Interval), 50 FR 4658, 101 FCC2d 973 (1985).

[8] *Report and Order* in Gen. Docket No. 80-112 and CC Docket No. 80-116 (ITFS, MDS, and OFS Services), 94 FCC2d 1203 (1983); see also *Report and Order* in MM Docket No. 83-523 (ITFS Order), 101 FCC2d 49 (1985).

[9] *See Continental Satellite Corporation, supra* at para. 3.

[10] Direct Broadcast Satellite Corporation's contention was directed both to the provision of service via complementary half-CONUS signals for eastern and western coverage of the United States, and via full-CONUS signals, whereby all coverage would originate from eastern locations, albeit from single signals rather than pairs of signals.

[11] In Region 1, which includes the Soviet Union, these frequencies are allocated for terrestrial microwave fixed services. Although service to Alaska is specifically provided for from 166^0W and 175^0W in the Region 2 Plan, any such service is further governed by the International Telecommuncations Union (ITU) Radio Regulations, and must be designed with full consideration given to the power flux density limitations of the inter-Regional sharing criteria set forth in the ITU Radio Regulations, Appendix 30, Annex 1. While it is true that energy dispersal, highly shaped beams, spot beams, or lower EIRP will mitigate these concerns, we request comments, calculations, and documentation on the practical level of service that can be designed with current spacecraft transmission technology consistent with the above-mentioned inter-Regional sharing limitations. While other administrations may also be affected by similar concerns, the Soviet Union/Alaska situation presents the worst case scenario, but comment is also invited on any similar considerations involving other administrations as well.

[12] For instance, all current proposals would provide a signal that is roughly half as strong in some areas as in others. Service level requirements could specify signal strength levels or other reception capability characteristics as well as numbers of channels of service.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In Re: Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service

I am both intrigued and concerned about allowing non conforming uses of DBS spectrum. While I support the concept of non conforming uses on DBS spectrum on a temporary basis, I am uncertain whether non conforming uses on a permanent basis from western orbital positions is in the best interest of the DBS service. Allowing DBS applicants to use these slots for other services may provide a second income stream, thereby enhancing the economic viability of the DBS video service. Alternatively, allowing permanent non conforming uses from western orbital positions raises difficult legal questions that go to the heart of our decision to allocate spectrum to DBS. Therefore, I must distance myself from the majority's tentative conclusion that permanent non conforming uses should be allowed from the western orbital positions.

Fundamentally, I believe in a strong viable DBS system that will serve the *entire* nation not simply the contiguous states. Our initial decision allocating spectrum to DBS contemplated service to the entire country. Accordingly, the Commission has an obligation to insure that DBS video service to Alaska and Hawaii take precedence over other non conforming uses. Such alternate uses from

western orbital positions should be secondary and allowed only after the needs of Alaska and Hawaii have been met. I am concerned that allowing non conforming uses on the western satellites provides a disincentive to serve Alaska and Hawaii with DBS video service. I am happy to see that the *Notice of Proposed Rule Making* solicits comment on this issue.

Finally, I simply do not see the reason why we must address these issues at this time. They are premature at best. DBS applicants are currently allowed to provide non DBS service on a temporary basis. None of the fifth round applicants proposed a permanent non conforming service from western orbital positions. It appears that the issue is self generated by the Commission. Therefore, commenters should address the issue of whether there is a need to resolve this issue at this time.

I believe DBS will make an important contribution to the telecommunications marketplace. I will examine these comments to make sure that the proposals do not jeopardize or undermine the service. There is a possibility that the approach taken in the *Notice of Proposed Rule Making* may assist in the development of the service. To the extent that a discussion of these issues may ultimately help the DBS service, I concur with the decision.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Notice of Proposed Rulemaking Concerning Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite (DBS) Service.

I write separately to explain my views on three issues:

1. Non-conforming use of the DBS spectrum.
2. Service to Alaska and Hawaii.
3. EEO requirements for DBS operators.

Non-conforming use

Generally, spectrum should be used for the purpose the Commission originally designated. Nevertheless, the special circumstances of DBS may warrant some flexibility. Allowing non-conforming use provides an incentive for DBS operators to use the spectrum efficiently. If a DBS operator manages to provide full-CONUS service from its eastern slots, it can then offer other service (such as voice or data) from the west. The public will benefit because it will receive more service from the 12.2-12.7 ghz band. On the other hand, if we "reward" DBS operators offering full-CONUS service by taking away their western slots, they may have no incentive to use spectrum efficiently in providing DBS.

We will also continue to insist that this spectrum be used primarily for DBS. We expect all DBS operators to meet our due diligence requirements. We have revoked authorizations in the past, and we will do so in the future, if an applicant fails to establish due diligence in its DBS service. Therefore, operators will be unlikely to develop non-conforming uses in the western slots, while slighting DBS. As in our HDTV proceeding, permitting non-conforming use will also help ensure that spectrum will not lie fallow while we wait for a new service to develop.

Alaska and Hawaii

I agree with my colleagues on the goal of making DBS available to Alaska and Hawaii and, indeed, to all Americans. Nevertheless, there may be an inherent tension between this desirable social goal and the economic viability of DBS.

To serve Alaska and Hawaii, even from the western orbital slots, would require separate, dedicated spot beams. For applicants seeking to provide full-CONUS service from some of the eastern orbital locations, serving Alaska and Hawaii could be even more costly. The Commission has no reliable estimates on the magnitude of those costs; it will, therefore, be important for commenters to address this question.

DBS's progress has been slow, even with the minimal regulations now in force. We may be at a stage in DBS corresponding to telephone service in the 1880s. The technology is promising, but untested in the marketplace. It might be prudent at this juncture to allow DBS operators to roll out the service in those areas where they believe they have the greatest likelihood of success. If and when DBS proves to be economically viable, we could then consider adopting a rule requiring universal service.

EEO

I would have expanded this rulemaking to include a reexamination of our EEO rule for DBS. I disagree with our rule that applies EEO requirements only to DBS permittees operating as "broadcasters." In both the broadcast and cable industries, we require companies to adopt affirmative action programs with the goal of recruiting, hiring, training and promoting qualified minority and women employees. For cable systems, Congress codified the EEO obligation in the 1984 Cable Act. 47 U.S.C. Section 554. Throughout the mass media, EEO enforcement has helped to expand opportunities for minorities and women and to promote diversity of programming and viewpoint.

In 1987, the Commission said that DBS operators offering pay television service should be classified as "non-broadcasters" because they do not distribute their programs indiscriminately to the public. *Report and Order,* 2 FCC Rcd 1001, 1006 (1987); *aff'd National Association for Better Broadcasting v. FCC,* 849 F.2d 665 (d.C. Cir. 1988). This distinction between "broadcasters" and "non-broadcasters" may make sense for some purposes--but not for EEO.

When the Commission adopted affirmative requirements in 1974, it said: "The courts, in interpreting equal employment law, have recognized that the most pervasive discrimination today results not from overt actions against individuals, but from normal, often unintentional and seemingly neutral practice throughout the employment process." *Employment Policies and Practices--Florida,* 44 FCC 2d 735, 737-38 (1974). The Commission said: "[T]he absence of systematic recruitment in the minority and female communities repeatedly have [sic] proved to result in creating a serious disadvantage to these individuals, and

the basic [affirmative action] conditions we have imposed have been found essential to eliminate (or compensate for) the effects of past discrimination." *Id.* at 739.[1]

The Commission has found that, in addition to broadcasting, "...there are numerous alternative electronic technologies that are providing competition and *making significant contributions to the marketplace of ideas." Notice of Proposed Rulemaking,* 2 FCC Rcd 1138, 1140 (1987) (emphasis added). The Commission cited cable television, low power television and MDS as emerging participants in the marketplace of ideas. The Commission also cited SMATV and VCRs as significant competitive forces. Surely, DBS, with its potential to deliver multi-channel programming nationwide, also ranks potentially as an important source of news, information, and public debate.[2]

Because of DBS's potential contribution to public debate, a DBS operator's EEO obligations should not depend upon whether viewers have to pay for programming. Why, for EEO purposes, should it matter whether a company is offering news over CBS (broadcast), CNN (non-broadcast) or a new DBS service? Why should DBS operators be treated differently than cable operators, whose customers must also pay for programming?

Any FCC licensee that provides programming--whether we call that company a broadcaster, a cable system, or a DBS operator--should be subject to our affirmative action rules. Rather than distinguishing between "broadcasters" and "non-broadcasters," we should regard all three industries as part of a single television marketplace, and subject all three to similar affirmative action requirements.

By exempting "non-broadcast" DBS operators from our affirmative action rules, we make it more difficult for minorities and women to enter this business at its crucial, early stage. As the Commission said in adopting EEO rules for "broadcast" DBS: "Employment decisions made at an early stage in the organization of DBS systems may have a lasting impact on the representativeness of the workforce of DBS operators..." *Report and Order,* 90 FCC 2d 676, 715 (1982). This statement is no less true for "nonbroadcast" DBS employment decisions. The Commission added that EEO "requirement[s] will not unduly burden licensees or restrict their ability to develop [the] service." *Id.* Therefore, I propose that we impose on "non-broadcast," pay television DBS systems affirmative action requirements similar to those we have already adopted for broadcasters, cable systems, and "broadcast" DBS systems.

FOOTNOTES FOR STATEMENT

[1] The Supreme Court observed: "The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees. *See* 47 CFR Sections 73.125, 73.301, 73.599, 73.680, 73.793 (1975). These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. Section 151 *et. seq.,* to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups... [citation omitted]." *NAACP v. FPC,* 425 U.S. 662, 670-71, n. 7.

[2] In 1983, the Commission offered a similar analysis of the video marketplace, saying: "In the case of traditional over-the-air television broadcasting, the industry can be construed too narrowly when, in fact, the appropriate confines of the market extend beyond its traditional boundaries... [Alternative] technologies ...may provide genuine substitutes in the viewer's mind for regular television broadcasting..." *Notice of Proposed Rulemaking in MM Docket No. 83-670,* 94 FCC 2d 678, 689 (1983). The Commission characterized DBS by saying: "Among with the multitude of services just discussed, other potential services could make significant breakthroughs that would add to the competitive nature of the video marketplace. Direct broadcast satellite could bring additional channels directly to the home from an orbiting satellite." Id. at 691-692.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-92

In re Application of

CATOCTIN BROADCASTING CORP. OF NEW YORK — File No. BR-810202VF, BR-840201UA

For Renewal of License of
Station WBUZ
Fredonia, New York

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1989; Released: August 15, 1989

By the Commission: Commissioner Dennis concurring and issuing a separate statement.

1. In the initial decision in this case, Administrative Law Judge Walter C. Miller concluded that Catoctin was unqualified for renewal on the basis of findings that Serafin had willfully conducted fraudulent contests, willfully and illegally discriminated in hiring, willfully and repeatedly violated public file and ascertainment requirements, and knowingly misrepresented material facts in Catoctin's renewal application and sworn statements. FCC 86D-52 (rel. Aug. 22, 1986). The Review Board affirmed his findings and conclusions. 2 FCC Rcd 2126 (1987). Catoctin raised two issues in an application for review of the Board's decision: (a) "[w]hether, in light of the sensitive First Amendment, candor, and renewal issues involved in this case, the appropriate standard of proof is the 'clear and convincing evidence' standard"; and (b) "[w]hether, . . . assuming that a violation of the Commission's . . . Regulations has been established . . ., forced divestiture rather than disqualification is the proper remedy."

2. After reviewing the record, the Commission determined that Catoctin's sole principal, Henry Serafin, had: (i) willfully violated the FCC's equal employment opportunity rule by discriminating against a job applicant because of her race; (ii) willfully violated an FCC rule by keeping the prize donated by a sponsor for a promotional contest instead of awarding the prize in keeping with the contest's advertised terms; and (iii) knowingly misrepresented the facts regarding those violations and concerning the placement of documents in WBUZ's public-inspection file, with the intention of deceiving the Commission. We therefore concluded that Catoctin was unqualified to remain a licensee and denied its renewal application. 4 FCC Rcd 2553 (1989) (" *Order* ").

3. Catoctin has filed a petition for reconsideration of the Commission's order denying renewal of its license. It contends that reconsideration is in order in light of the Commission's approval of the settlement agreement concerning the application of RKO General, Inc. for renewal of its license for Station KHJ-TV (Los Angeles, California), *RKO General, Inc.*, 3 FCC Rcd 5057 (1988)("*KHJ - TV Settlement Order*"), which occurred after Catoctin had filed its application for review in this proceeding. In approving that settlement, Catoctin notes, the Commission permitted RKO to dispose of the licensed station and receive in exchange a payment amounting to 67 percent of its full market value, notwithstanding that the ALJ presiding in the case had found RKO disqualified for renewal by reason of misconduct, *RKO General, Inc.*, 2 FCC Rcd 4807 (ALJ 1987)("*Phase I I.D.*") and that the questions presented on exceptions to his initial decision remained to be resolved. Catoctin contends that the decision to deny its renewal application for Station WBUZ and to reject its contingent request for a chance to divest is inconsistent with the Commission's decision to approve the settlement proposal for KHJ-TV.

4. Catoctin asserts that the findings of misconduct against its principal, Henry Serafin, "pale in comparison" with the ALJ's findings against RKO. It maintains that to permit it to sell WBUZ to a qualified purchaser for 65 percent of market value would serve the public interest by placing the station in the hands of a licensee with unclouded prospects while preserving deterrance, as Serafin would still suffer a substantial loss due to the price restriction in addition to having incurred considerable litigation expense in the course of this proceeding. In these respects, Catoctin says, the equities favoring renewal conditioned on divestiture are no different here than in the case of the KHJ-TV settlement.

5. Catoctin concedes that granting its request for conditional renewal would not relieve the Commission of administrative burdens to the extent that granting the KHJ-TV settlement did. It acknowledges that the instant proceeding has not taxed the Commission's resources as did the RKO case, but it stresses that this is so because Catoctin, unlike RKO, owns but a single station serving a rural community rather than a multi- million dollar network of stations and because the charges against Catoctin, unlike those against RKO, did not involve an intricate pattern of widespread corporate misconduct that remained unresolved after 23 years of litigation. Catoctin argues, in effect, that to deny it relief like that accorded RKO in the KHJ- TV settlement order because of these distinctions would create the appearance that the Commission applies double standards, a harsh one for small licensees and a lenient one for "the RKOs of this world." That, in Catoctin's view, would not comport with the Commission's holding, in *Melody Music, Inc.*, 2 FCC 2d 958 (1966), that large licensees should not be treated more favorably than small ones. *Id.* at 962. Catoctin therefore requests an order on reconsideration renewing its license for a period of one year, on the condition that it submit a proposal to assign the license to a qualified applicant at "significantly" less than full market value within 60 days. In an attached affidavit, Serafin avers, among other things, that since the Commission issued the order denying renewal he has "been in contact with" two potential purchasers of WBUZ.

6. The Chief of the Commission's Mass Media Bureau ("Bureau") opposes granting the relief that Catoctin seeks. The Bureau contends that the petition for reconsideration is in violation of Sections 1.106(b)(2) and 1.115(g) of the Commission's Rules, which provide that the Commission

will not entertain a petition for reconsideration of the denial of an application for review unless the petition turns on events that occurred "since the last opportunity to present such matters" or on facts that were then unknown to the petitioner and not then subject to discovery through ordinary diligence. The Bureau asserts that the petition merely rehashes the argument for divestiture that Catoctin raised in its application for review, which the Commission has already rejected, and adds that the Commission customarily refuses to grant reconsideration just to re-debate issues which it has already decided.

7. As for the merits, the Bureau asserts that there are no extraordinary circumstances in this case like those discussed in the KHJ-TV settlement order; that this case is also unlike others that Catoctin cited in which the Commission allowed renewal applicants to sell their stations after a hearing; and that to grant Catoctin the relief that it seeks would be tantamount to holding that any unqualified renewal applicant will be permitted to assign his license for compensation at the conclusion of proceedings should he not prevail on the merits. According to the Bureau, such an action would vitiate the doctrine of *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964), that in order to deter misconduct the Commission generally will not permit renewal applicants charged with misconduct to sell their stations while their qualifications remain in doubt.

8. The intervenors in this proceeding, namely, The Chautauqua County Rural Ministry and the NAACP, Dunkirk Branch, which refer to themselves collectively as "the Objectors," filed a joint opposition. They assert, to begin with, that Catoctin has presented no new information of decisional significance. They contend that Serafin's averment that he has begun negotiation for a transaction that, in the view of the Objectors, is not permissible under established law is no reason for reopening the record or setting aside the Commission's conclusions.

9. Next, the Objectors argue that the instant petition is really nothing more than an untimely petition for reconsideration of an order issued by the Commission in July 1986 denying a motion that Catoctin had filed shortly after the conclusion of the evidentiary hearing seeking permission to conduct a post-hearing "minority distress sale." FCC 86-335 (July 31, 1986) ("*1986 Order*"). Because Catoctin did not seek reconsideration of that order within the time allowed, the Objectors assert, that ruling is now "the law of this case," not subject to reversal. They therefore contend that even assuming, for the sake of argument, that the *KHJ - TV Settlement Order* has since modified the *Jefferson Radio* policy, Catoctin is estopped from invoking that ruling as a ground for reconsidering the refusal to permit divestiture in this case. According to the Objectors, "the applicability of possible changes in policy was precisely the issue that was conclusively determined in the *1986 Order*.

10. Furthermore, the Objectors contend that the *KHJ - TV Settlement Order* did not alter policy in any relevant way. They note that the Commission there disclaimed any intention of changing basic policy; rather, it merely made a narrow exception to the general rule based on the peculiar facts of the case. The Objectors maintain that the circumstances in light of which the Commission granted approval of the KHJ-TV settlement agreement are materially different from the circumstances presented here. They mention these distinctions: (1) All of the parties to the KHJ-TV renewal proceeding subscribed to the settlement agreement that the Commission approved in the *KHJ - TV Settlement Order*, whereas the Objectors have no intention of acquiescing in a divestiture by Catoctin; (2) RKO had excepted in detail to the adverse findings of the *Phase I I.D.*, whereas Catoctin has preserved no issue for appeal on the merits except a legal question concerning the standard of proof; (3) the KHJ-TV renewal proceeding had defied resolution for 23 years, whereas the instant case is relatively uncomplicated; (4) the KHJ-TV settlement was proposed and approved in advance of a decision on the merits by the Commission, whereas here the Commission has already issued a final decision; (5) if the Commission were to have reversed the ALJ's holding that RKO General was disqualified, it would have been necessary, absent settlements, to determine whether RKO was entitled to a renewal expectancy with respect to each of its fourteen stations and to compare the qualifications of RKO and numerous challengers in each of ten proceedings; here, in contrast, in the assertedly unlikely event that Catoctin were to prevail on appeal, the litigation would be at an end; and (6) RKO had already lost a station license because of misconduct that was at issue in "Phase I" of the proceeding on its renewal application for KHJ-TV, whereas no such sanction has been imposed on Catoctin based on the misconduct at issue in this case.

11. In reply to the arguments that its petition is procedurally defective, Catoctin reasserts that the release of the *KHJ - TV Settlement Order* was, indeed, a change of circumstance within the meaning of 47 C.F.R. § 1.106(b)(2)(i). It also denies that the instant petition merely rehashes an argument made in the application for review. The essential purpose of its petition, Catoctin states, is to exhaust its admininstrative remedies by raising with the Commission the issue as to the legality of the denial of renewal in this case in light of the decision to approve the KHJ-TV settlement. As for the contention that its petition is really an untimely request for reconsideration of the *1986 Order*, grant of which is foreclosed by the law of the case, Catoctin responds that the contention ignores the fact that the *1986 Order* concerned the minority distress-sale policy, which is not at issue here. Catoctin argues that it cannot be foreclosed from presenting a challenge predicated upon the *KHJ - TV Settlement Order* merely because it "failed" to raise the argument in an unrelated context in 1986, two years before the order's release.

DISCUSSION

12. We reject the opponents' procedural arguments. The petitioner predicates its request for reconsideration upon an event, the release of the *KHJ - TV Settlement Order*, which occurred since the last opportunity for advocacy provided under the FCC's rules. The prerequisites of 47 C.F.R. § 1.106(b)(2) are therefore satisfied. The petition is not merely a rehash of the application for review or Catoctin's 1986 petition for permission to conduct a minority distress sale. While Catoctin had raised the issue of a forced divestiture in those earlier motions, its argument that the *KHJ - TV Settlement Order* governs this case is new. In response to Catoctin's arguments in its application for review, the Commission considered generally the issue of whether forced divestiture was warranted and concluded that "after considering Catoctin's alternative arguments and proposed remedies. . . our findings [of misconduct] compel denial of Catoctin's renewal

application." 4 FCC Rcd at 2558 ¶ 45. Nonetheless, in light of Catoctin's new argument it now behooves us to consider whether our conclusion is inconsistent with our KHJ-TV settlement approval.

13. We therefore turn to the issue now before us: whether it would be inconsistent to refuse to allow Catoctin to divest WBUZ after having let RKO dispose of KHJ-TV for 67 percent of market value in the *KHJ - TV Settlement Order*. We believe that there is no inconsistency; the different results are justified by significant differences between the cases.

14. The compelling public interest considerations that weighed in favor of approving the KHJ-TV settlement are not present in this case. In considering the KHJ-TV settlement proposal, the Commission noted that the RKO case was "unique in the degree to which it has frustrated the best attention of the Commission to bring it to a satisfactory resolution." 3 FCC Rcd at 5059 ¶ 17. As a result of a pending comparative renewal proceeding, RKO had operated KHJ-TV under a cloud of uncertainty for 23 years. Moreover, by the time of the settlement proposal, 13 co-owned stations in eight communities, also involved in comparative renewal proceedings, similarly operated under a cloud. The Commission found that without settlement, there was no prospect for alleviating this undesirable situation in the forseeable future because of the unusual complexity of the pending proceedings.

15. The complexity of those proceedings arose from the fact that RKO's renewal applications for KHJ-TV and thirteen other RKO broadcast licenses were in comparative hearing along with 70 mutually exclusive challenging applications and that the pending exceptions to the *Phase I I.D.* presented difficult and unusual legal issues and numerous complicated factual issues that could not be resolved without comprehensive review of a massive trial record. Consequently, as the Commission explained in the *KHJ - TV Settlement Order*, it would take many additional years of litigation before the agency and the courts to resolve the KHJ-TV proceeding and the interrelated contests for RKO's other licenses on the merits. 3 FCC Rcd at 5058-59 ¶¶ 7-14. Hence, in the absence of settlements, years would go by before the fourteen stations in question would be operated by licensees with unchallenged qualifications and unclouded prospects.

16. The Commission found that state of affairs to be contrary to the public interest. By contrast, "under the particular circumstances of the RKO proceedings, approval of the agreement" would best further the public interest, the Commission concluded. *Id.* at 5059 ¶ 18. In granting approval of the KHJ-TV settlement, the Commission recognized that an unusually strong public interest existed in expeditiously resolving the KHJ-TV proceeding and those of the 13 co-owned stations by placing these stations in the hands of unquestionably qualified licensees able to devote their full resources to broadcasting in the public interest. Thus, the Commission approved the KHJ-TV settlement not only in order to avoid years of expensive and burdensome litigation in a series of unusually complicated multi-party license contests, but also to avoid the prospect of the public in communities across the country continuing to receive service for prolonged periods from a challenged licensee in immediate danger of losing its license. The Commission was concerned that the uncertainties facing such a licensee cannot have a positive effect on the station and are likely to deter long-term investments in the station and its programming. *Id.* at 5059-60 ¶¶ 17-22.

17. This case, by contrast, presents no such extraordinary public interest considerations. It is not unusually protracted or complex. Catoctin has already exhausted its administrative remedies, and no complicated factual issues remain subject to litigation here, as Catoctin has preserved no issue for appeal except a legal question as to the standard of proof. *Order*, 4 FCC Rcd at 2553 ¶ 4. This is therefore an ordinary case to which the limitations of *Jefferson Radio* squarely apply.

18. Additionally, in ruling on the KHJ-TV settlement, the Commission found that its approval would nonetheless preserve the considerations of deterrence underlying *Jefferson Radio*. Catoctin's proposal here would not preserve the Commission's policy of deterrence in the same manner. In the *KHJ - TV Settlement Order*, it was significant to the Commission's decision to approve the settlement that, in addition to receiving substantially less than fair market value (indeed, $105 million less), RKO had already suffered the loss of VHF Station WNAC-TV in Boston, Massachusetts, for misconduct that was also at issue in the KHJ-TV proceeding. The Commission highlighted the magnitude of that loss by noting that a similar station in Boston had sold for $220 million in the same year that *certiori* was denied in the WNAC-TV proceedings and was resold for $450 million slightly more than three years later. 3 FCC Rcd at 6062 ¶ 34. That the Commission had already imposed so severe a sanction upon RKO on account of pertinent misconduct was a significant basis for its conclusion that approving the KHJ-TV settlement would not subvert its deterrence policy and hence could be allowed as an exception to the general policy of *Jefferson Radio, supra. Id.* No such sanction has been imposed on Catoctin. Therefore, Catoctin is wrong in contending that this case is just like the *KHJ - TV Settlement Order*.

19. In sum, the *KHJ - TV Settlement Order* is not a controlling precedent here because: (a) under the unique circumstances of that case, there were extraordinarily compelling public interests to be served by permitting the KHJ-TV settlement, the like of which are not present here; and (b) RKO, unlike Catoctin, had already forfeited a valuable station license because of misconduct at issue, which was a significant factor in concluding that the Commission's policy of deterrence would not be compromised by approving the settlement.

20. While we quite agree that the Commission ought not to apply a double standard favoring "big" licensees over "small" ones, we do not do so where the particular circumstances of a case warrant different results. The material distinctions that we have identified between the situation here and the unique circumstances that permitted approval of the KHJ-TV settlement are decisive differences bearing on the public interest. As we emphasized in the *KHJ - TV Settlement Order* and as we reiterate here, it is the public interest that is our overriding concern. These distinctions warrant the different treatment that we have accorded Catoctin and RKO.

21. ACCORDINGLY, IT IS ORDERED that the petition for reconsideration filed April 21, 1989 by Catoctin Broadcasting Corp. of New York IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In re: Application of Catoctin Broadcasting Corp. of New York For Renewal of License of Station WBUZ, Fredonia, New York (MM Docket No. 85-92; File Nos. BR-810202VF, BR-840201UA).

I concur in the result because, as our earlier decision in this proceeding explained, there are ample grounds for denying WBUZ's renewal application. 4 FCC Rcd 2553 (1989). I do not, however, agree that there were "compelling public interest considerations" that warranted approval of the KHJ-TV settlement. *See* Dissenting Statement of Commissioner Patricia Diaz Dennis, 3 FCC Rcd 5067 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TUCSON COMMUNITY BROADCASTING, INC. Tucson, Arizona	**BC DOCKET NO. 79-58** File No. BPH-10,345
TUCSON FM BROADCASTING CORPORATION Tucson, Arizona	**BC DOCKET NO. 79-59** File No. BPH-10,347

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1989; Released: August 15, 1989

By the Commission:

1. The Commission has under consideration a Review Board decision, *Tucson Community Broadcasting, Inc.*, 2 FCC Rcd 568, recon. denied, 2 FCC Rcd 2860 (1987), granting the application for a new FM station at Tucson, Arizona, filed by Tucson Community Broadcasting, Inc. (Community); an Application for Review filed June 17, 1987 by Tucson FM Broadcasting Corporation (Tucson FM);[1] a Petition to Dismiss Application filed January 12, 1988 and a Supplement filed January 14, 1988 by Tucson FM;[2] and a Petition to Re-open the Record filed May 1, 1989 by Tucson FM.[3]

2. Tucson FM argued in its Petition to Dismiss that Community's antenna tower had not been cleared by the Federal Aviation Administration. As a result of Tucson FM's allegations, the Office of General Counsel issued an order under delegated authority taking official notice of the following documents from the FAA's files:

(1) Letter dated January 4, 1988 from S. G. requesting FAA approval for construction of its tower.

(2) Letter dated March 4, 1988 from the FAA advising S.G. of the results of a preliminary study of its tower.

(3) Letter dated March 29, 1988 from S.G. advising the FAA that it was "requesting authorization to construct a bare tower" and "[c]ustomers desiring to place their antennae on the tower will apply for their own permits for their stations to use our location."

(4) FAA Form 7460-1, dated April 1, 1988 approving the construction of S.G.'s bare tower, without any antennae.

Tucson Community Broadcasting, Inc., FCC 88I-056 (Gen. Counsel June 10, 1988). The June 10 order asked Community to explain its failure to obtain FAA clearance for the antenna it proposed to place on the tower and to describe the steps it was taking to obtain the required FAA clearance.[4]

3. Tucson FM's June 1987 Application for Review raises no question concerning the Review Board's decision warranting our consideration and it will be denied without further discussion. Tucson FM, however, in its January 1988 Petition to Dismiss and in pleadings filed in response to the General Counsel's June 10, 1988 order, raises questions requiring comment. Those questions concern whether the Commission should allow Community to perfect its application, whether Community was diligent in securing FAA clearance for its antenna, whether Community modified its antenna proposal so that it will be unable to provide its proposed coverage, and whether Community has acted with candor. In the Petition to Re-open, Tucson FM argues that a change of policy announced in the *Second Report and Order in the Matter of the Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules (Second Report and Order)*, 4 FCC Rcd 1741 (1989), requires a re-evaluation of the coverage preference awarded Community.

I. THE JUNE 10 ORDER

4. Tucson FM argues that Community's application should have been dismissed because it did not have reasonable assurance of site availability and that the June 10 order erred in allowing Community to correct a fatal defect concerning the availability of its proposed antenna site. As reflected below, Community has had reasonable assurance of the availability of its site and thus Tucson FM has not presented a basis for a dismissal of Community's application. The Commission, however, can only accept Community's current FAA antenna clearance if there is good cause for its proposed amendment. *Kannapolis Television Co.*, 3 FCC Rcd 2676, 2676 ¶ 6 (1988); *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488-89 ¶¶ 16-17 (1981).

II. COMMUNITY'S DILIGENCE

5. Community specified a transmitter site on land managed by the United States Forest Service in its application filed December 1, 1976. The Forest Service, however would not grant Community a use permit until it was issued a construction permit by the Commission. In 1983 the Forest Service opened the proposed site for competitive bids from developers proposing to erect a multiple-use tower. On February 28, 1986, a special use permit for multiple-use development was issued to S.G. Communications West, Inc. On September 17, 1987, Community advised the Commission that S.G. had completed construction of its tower. However, as noted in the June 10, 1988 order, S.G. advised the FAA that it was "requesting authorization to construct a bare tower" and that "[c]ustomers desiring to place their antennae on the tower will apply for their own permits for their stations to use our location." On April 1, 1988 the FAA determined that S.G.'s tower would not be a hazard to air navigation but stated that the clearance "is for the structural tower only

and does not include any transmitting equipment." On June 10, 1988, the General Counsel issued the order inquiring into Community's failure to obtain a clearance for its antenna from the FAA. On June 21, 1988, Community applied for FAA clearance for its proposed antenna. On July 6, 1988, the FAA determined that Community's antenna "would not be a hazard to air navigation."

6. Based on the record before it, the Board properly found that Community had been diligent in it efforts to obtain reasonable assurance of site availability and that there was no basis for site availability or other issues. 2 FCC Rcd at 568-69 ¶¶ 2-4. Community, however, did not obtain FAA clearance for its antenna until after the General Counsel's request for comments concerning its failure to have an FAA clearance. Community states that it was not privy to the communications between S.G. and the FAA and that it did not know until June, 1988, that it was responsible for applying for the FAA clearance for its antenna. Response, filed June 27, 1988, by Community. It is now clear that S.G. was responsible for obtaining FAA clearance only for the antenna tower. With more effort Community could have uncovered the pertinent FAA documents and ascertained that it was individually responsible for obtaining the clearance to place its antenna on S.G.'s tower. However, there is no evidence that Community was aware that it was responsible for obtaining the clearance, that S.G. advised Community that Community would be required to obtain the clearance for its antenna, or that Community knew of the correspondence between S.G. and the FAA. Although these events have unfortunately served to delay the institution of Community's proposed broadcast service, thereby postponing the benefits of this new outlet for the residents of Tucson, there are no circumstances that would warrant any adverse finding against Community. In this regard, Community has persistently sought to perfect its proposal to use the antenna site in question and that effort has now been vindicated. In light of the showing before us, we are persuaded that Community has satisfied the good cause criteria of *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 ¶ 7 (1970), that Community's amendment should be accepted, and that there is no basis for dismissal of Community's application.

III. COMMUNITY'S ANTENNA

7. In its reply pleading filed July 27, 1988, Tucson FM argues for the first time that Community has modified its antenna proposal in a manner that will prevent it from achieving the coverage pattern relied on by the ALJ and the Board in granting Community's application. Tucson FM asserts that Community originally proposed a top-mounted antenna with a circular radiation pattern. It argues that Community is now proposing a side-mounted antenna that precludes the circular coverage pattern underlying Community's coverage preference. Tucson FM asks that the proceeding be remanded for further hearings on Community's coverage proposal.

8. Tucson FM's argument concerning Community's coverage pattern is untimely. In its Petition to Dismiss, filed January 12, 1988, Tucson FM stated that Community has been proposing a side-mounted antenna "[s]ince the Spring of 1986." Tucson FM has never explained why it could not have raised its arguments concerning the circularity of Community's coverage pattern in a more timely manner, and those arguments are not based on new information or facts previously unknown to Tucson FM. Tucson FM has not shown good cause for its dilatory request for a coverage issue and additional hearings. Rather, at this late hour, having had its arguments rejected by the Board, Tucson FM raises a new issue that is "apparently only now deemed crucial . . . when seen from the highland of hindsight." *Guinan Realty Co. v. FCC*, 297 F. 2d 782, 786-87 (D.C. Cir. 1961).

9. Moreover, Tucson FM has misread Community's application. Community never proposed a top-mounted antenna. It initially proposed a "three bay, dual polarized antenna . . . mounted *near the top* of a proposed 120-foot self-supporting tower." Community's Application Exh. 1 (emphasis added). In a letter dated June 21, 1988 requesting FAA clearance for its antenna, Community stated that it "proposes to side mount its 3 bay circularly polarized . . . antenna . . . on SG Communication's FAA approved 240 foot tower at 110 feet above ground level (AGL) on Mt. Bigelow, Tucson, Arizona." Thus, there was not a material change in Community's antenna configuration. The only change was in the height of the tower. On both its own originally proposed tower and on S.G.'s tower, Community proposed to side mount its antenna at about 110 to 120 feet above ground level. Finally, we agree with the Bureau that Tucson FM's argument is based on speculation. Tucson FM did not conduct tests or take measurements that would establish that the previously credited engineering evidence as to Community's coverage is in error. Under these circumstances Community's data establishing its service contours is unrebutted and Tucson FM has not provided a basis for further questioning of Community's coverage preference.

IV. COMMUNITY'S CANDOR

10. Tucson FM argues that Community has been lacking in candor because Community concealed the loss of its transmitter site, because it misrepresented who had responsibility for securing the FAA clearance, and because it concealed a change in its antenna proposal.

11. *The transmitter site*: We reject Tucson FM's argument that Community lacked candor concerning the availability of its site. We affirm the finding of the Board that Community has always had reasonable assurance of site availability. Moreover, Tucson FM has not alleged facts to support a finding that Community knowingly or intentionally concealed any pertinent information concerning its proposed site from the Commission.

12. *FAA clearance*: In an affidavit attached to Community's June 22, 1988 Response to the request for information about Community's efforts to secure FAA clearance, Community's principal, Thomas Rockler, stated " SG had informed TCB [Community] that it was proceeding with the FAA filing requirements for its Mt. Bigelow site." Tucson FM argues that Community is lacking in candor because a letter dated March 29, 1988 from S.G. to the FAA stated that S.G. was "requesting authorization to construct a bare tower . . . . Customers desiring to place their antennae on the tower will apply for their own permits for their stations to use our location."

13. Designation of a candor issue is not warranted. Tucson FM's request is based on speculation. There is no evidence that S.G. had required Community to file for its own clearance before S.G.'s March 29, 1988 letter to the

FAA, that Community was aware of the March 29 letter, or that S.G. thereafter told Community that it was obligated to secure the clearance for its use of the tower. As shown by the record, after S.G.'s tower was cleared by the FAA, obtaining the clearance for Community's antenna was a relatively simple matter. Under these circumstances there was nothing to conceal, and Rockler's statement can most reasonably be viewed as resulting from a failure to communicate with S.G. Moreover, Rockler's representation is consistent with the other documents submitted, and Tucson FM has not presented any evidence, such as affidavits from S.G.'s principals, that would call into question the veracity of Rockler's affidavit. *Phoenix Media Corp.*, 2 FCC Rcd 498, 499-500 ¶¶ 18-20 (1987); *Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172, 1180 ¶ 18 (Rev. Bd. 1981), modified on other grounds, 88 FCC 2d 620 (1981).

14. *Community's Antenna* : Tucson FM asserts that Community lacked candor when it represented that it "has not changed (either formally or informally) its original antenna proposal." Opposition to Reply, filed August 1, 1988. Tucson FM asserts that this statement covered up the changes in Community's proposal that would interfere with its ability to achieve its coverage proposal. However, as noted above, there has not been a material change in Community's proposal to side mount an antenna at about the 110 foot level of the broadcast tower. Moreover, all of the relevant information concerning Community's antenna configuration was readily available to all of the parties and Tucson FM has alleged no facts that would reflect an intent by Community to mislead or conceal facts from the Commission. Thus, there is no basis for designation of an issue concerning whether Community intentionally sought to mislead the Commission or withhold relevant information with respect to its antenna configuration. *Phoenix Media Corp.*, 2 FCC Rcd at 499-500 ¶¶ 18-20; *Garrett, Andrews & Letizia*, 86 FCC 2d at 1180 ¶ 18.

V. THE PETITION TO RE - OPEN

15. Tucson FM asserts that subsequent to the Review Board's decision, the Commission adopted a new policy that noncommercial stations would be considered as a "voice" serving a community. *Second Report and Order, supra.* It argues that this policy requires the Commission to consider the service of KUAT-FM, a noncommercial FM station operating on Mt. Bigelow, in determining the extent of Community's coverage preference. Tucson FM asserts that Community's white area must be reevaluated in a further evidentiary hearing.

16. It is not necessary to decide whether the holding in the *Second Report and Order* considering noncommercial stations in requests for waivers of the cross-ownership rules should be extended to include comparative coverage determinations. Tucson FM has failed to meet the standard for re-opening the record at this late stage of the proceeding. "[W]here the record in the proceeding has already been closed, as in this case, petitioners must show . . . that the new evidence, if true, would effect the ultimate disposition of the proceeding." *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 730 ¶ 6 (1988). Tucson FM has failed to make any specific showing of the populations and areas served by KUAT- FM, the extent to which they are within the white area to be served by Community, and the decisional significance of any resulting reduction in that white area. Under these circumstances it appears that Tucson FM's Petition to Re-open is merely another attempt to delay the ultimate resolution of this proceeding at the expense of the initiation of a new broadcast service, and that the Petition should therefore be summarily denied.

VI. OTHER MATTERS

17. Tucson FM argues in its Motion to Strike that Community improperly relies on extra-record materials in Exhibits 7 and 8 attached to its Opposition to Application for Review, in its Request for Expedited Consideration, and in the Supplement to the Request for Expedited Consideration. Those submissions allegedly provide further support for the Review Board's conclusion concerning other aspects of the site availability questions. In its opposition, Community offers to withdraw a letter attached to the Supplement. Exhibits 7 and 8 attached to Community's Opposition and the letter attached to the November 16, 1987 Supplement are letters and photographs submitted by Community to document S.G.'s progress toward construction of its tower. We have not relied on those materials in reaching our determinations in this case. Therefore, the Motion to Strike will be dismissed as moot.

18. In its Requests for Expedited Consideration, Community argues that this proceeding was previously remanded by the Commission and that its application was filed 11 years ago. *Golden State Broadcasting Corp.*, 102 FCC 2d 797 (1985). The delays in the resolution of this proceeding since the Board's decision are largely attributable to the problems concerning Community's efforts to perfect its antenna site and obtain FAA clearance for its antenna. However, consistent with the priority of other matters and the efficient disposition of the Commission's business, we have given expeditious consideration to the pleadings filed in this proceeding.

VII. ORDERS

19. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 U.S.C. § 5(C)(5) and 47 C.F.R. § 1.115(g), the Application for Review filed June 17, 1987 by Tucson FM Broadcasting Corporation IS DENIED.

20. IT IS FURTHER ORDERED, That the Petition to Dismiss filed January 12, 1988, as supplemented January 14, 1988 by Tucson FM Broadcasting Corporation IS DENIED.

21. IT IS FURTHER ORDERED, That the Petition to Re-open the Record filed May 1, 1989 by Tucson FM Broadcasting Corporation IS DENIED.

22. IT IS FURTHER ORDERED, That the Request for Expedited Consideration of Application for Review filed October 1, 1987, as supplemented November 16, 1987, by Tucson Community Broadcasting, Inc. and the Petition for Expedited Consideration filed May 19, 1989 by Tucson Community Broadcasting, Inc. ARE GRANTED to the extent indicated herein, and in all other respects ARE DENIED.

23. IT IS FURTHER ORDERED, That the Motion to Strike filed November 25, 1987 by Tucson FM Broadcasting Corporation IS DISMISSED as moot.

24. IT IS FURTHER ORDERED, That the Petition for Leave to File an opposition to reply filed August 1, 1988 by Tucson Community Broadcasting, Inc. IS GRANTED;

and that the Reply filed August 1, 1988 and the Erratum filed August 10, 1988 by Tucson Community Broadcasting, Inc. ARE ACCEPTED.

25. IT IS FURTHER ORDERED, That Petition for Acceptance filed September 23, 1988 by Tucson FM Broadcasting Corporation IS GRANTED; and that the Response filed September 20, 1988 by Tucson FM Broadcasting Corporation IS ACCEPTED.

26. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed August 9, 1988 by Tucson Community Broadcasting, Inc. IS GRANTED; and that the Amendment filed August 9, 1988 by Tucson Community Broadcasting, Inc. IS ACCEPTED.

27. IT IS FURTHER ORDERED, That the Application of Tucson FM Broadcasting Corporation (File No. BPH-10,347) IS DENIED and the Application of Tucson Community Broadcasting, Inc. (File No. BPH 10,345) for a new FM broadcast station at Tucson, Arizona IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Also before the Commission are an Opposition to Application for Review filed July 2, 1987 and Erratum filed July 9, 1987 by Community; a Request for Expedited Consideration of Application for Review and a Supplement filed October 1, 1987 and November 16, 1987 by Community; a Motion to Strike filed November 25, 1987 by Tucson FM; an Opposition filed December 3, 1987 by Community and a Petition for Expedited Consideration filed May 19, 1989 by Community.

[2] On February 5, 1988 Community filed an Opposition and Tucson FM filed a Reply on February 26, 1988.

[3] Oppositions were filed May 10, 1989 by Community and by The Mass Media Bureau. Tucson FM filed an Erratum on May 19, 1989.

[4] Community filed a response to the order on June 27, 1988. It also submitted a letter on July 12, 1988 advising the Commission that it had obtained clearance from the FAA for its antenna. On August 9, 1988 Community filed a Petition for Leave to Amend and an Amendment reporting the FAA clearance. Tucson FM filed a Reply on July 27, 1988, as corrected on October 31, 1988. Community filed a Petition for Leave to File an opposition to reply and an Opposition on August 1, 1988, and an Erratum on August 10, 1988. Tucson FM filed Comments on August 10, 1988, as corrected on October 31, 1988, and a Response on September 20, 1988. On September 23, 1988, Tucson FM filed a Petition for Acceptance, asking the Commission to accept its September 20, 1988 Response. On October 6, 1988 the Mass Media Bureau filed Comments. On November 4, 1988, Community filed a Reply.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Correction of Part 74 of
Commission's Rules

ERRATUM

Released: August 14, 1989

1. On July 12, 1989, the Mass Media Bureau released an Order (DA 89-756) correcting part 74 of the Commission's Rules. As part of this decision, a footnote was added to Paragraph (a) of Section 74.502. The footnote should have been added to Paragraph (b) of that Section to read as follows:

Section 74.502 Frequency assignment.

* * * * *

(b) The frequency band 044-952 MHz[1] * * *

[1] NOTE: In addition to this band, stations in Puerto Rico may continue to be authorized on 942.5, 943.0, 943.5, 944.0 MHz in the band 942-944 MHz on a primary basis to stations and services operating in accordance with the Table of Frequency Allocations.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-306

In the Matter of

Amendment of Section 73.202(b),	RM-5837
Table of Allotments,	RM-6120
FM Broadcast Stations.	RM-6121
(Albert Lea, Red Wing and Stewartville, Minnesota)	

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1989; Released: August 14, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for reconsideration filed by Sorenson Broadcasting Corporation, ("Sorenson") licensee of Station KWNG, Channel 288A, Red Wing, Minnesota, directed against the *Report and Order* in this proceeding, 3 FCC Rcd 5894 (1988). Communications Properties, Inc. ("CPI"), licensee of Station KCPI, Channel 237A, Albert Lea, Minnesota, filed an Opposition to Petition for Reconsideration and Sorenson filed a Reply. For the reasons discussed below, we will deny the petition for reconsideration.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by CPI proposing the substitution of Channel 235C2 in lieu of Channel 237A at Albert Lea, and modification of the Station KCPI license to specify operation on Channel 235C2. In order to accomodate a Channel 235C2 allotment at Albert Lea, it was necessary for CPI to propose changing the vacant Channel 235A allotment at Stewartville, Minnesota, to Channel 287C2. In turn, a Channel 287C2 allotment at Stewartville required CPI to also propose the substitution of Channel 290A in lieu of Channel 288A at Red Wing, Minnesota, and modification of Station KWNG's license to specify operation on Channel 290A. In response to the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 2 FCC Rcd 4616 (1987), we received a counterproposal from Sorenson proposing the substitution of Channel 290C2 in lieu of Channel 288A at Red Wing and modification of the Station KWNG license to specify operation on Channel 290C2.

3. In the *Report and Order*, we substituted Channel 235C2 in lieu of Channel 237A at Albert Lea, Channel 287C2 in lieu of Channel 235A at Stewartville, and Channel 290A in lieu of Channel 288A at Red Wing. In making these substitutions, we also modified the license of Station KCPI to specify operation on Channel 235C2 at Albert Lea, and the license of Station KWNG to specify operation on Channel 290A at Red Wing. In regard to the Channel 290C2 counterproposal advanced by Sorenson, we noted that this proposed upgrade at Red Wing was in conflict with a proposal in MM Docket No. 87-310 for the substitution of Channel 290C2 in lieu of Channel 288A at Chippewa Falls, Wisconsin, and modification of the license of Station WCFW, Channel 288A, Chippewa Falls, to specify operation on Channel 290C2. We determined that the Channel 290C2 upgrade at Red Wing was more appropriately considered in MM Docket No. 87-310 since it was in conflict with the Chippewa Falls upgrade and was a timely counterproposal in that proceeding.[1] Therefore, no further consideration was given to a Channel 290C2 allotment at Red Wing in this proceeding. Finally, in regard to Stewartville, we substituted Channel 287C2 in lieu of Channel 235A and permitted the six pending applicants for Channel 235A at Stewartville to amend their applications to specify Channel 287C2 without loss of cut-off protection.[2]

4. In its petition for reconsideration, Sorenson states that the *Report and Order* in this proceeding should be clarified to specifically state that CPI is required to reimburse it for all reasonable expenses incurred in changing channel. In addition, Sorenson refers to the fact that Bushland Radio Specialities has filed a petition for reconsideration of the *Report and Order* in MM Docket No. 87-310 modifying the Station KWNG license to Channel 290C2. As a result of this filing, the Channel 290C2 modification of the Station KWNG license is automatically stayed. *See* Section 1.420(f) of the Commission's Rules. In regard to its Channel 290A license modification in this proceeding, Sorenson contends that it should not have to undertake two license modifications. Instead, Sorenson requests that it not be required to effectuate the Channel 290A modification until a final resolution in MM Docket No. 87-310. In the event the upgrade at Red Wing is affirmed, it would then go forward with the upgrade on Channel 290C2 at the new site.

5. We will deny the petition for reconsideration. First of all, CPI is clearly required to reimburse Sorenson for the reasonable costs of changing its channel. *Circleville, Ohio*, 8 FCC 2d 159 (1967); *Forest Lake, Brainerd and Morris, Minnesota*, 61 FCC 2d 113 (1976); *Hampton, Iowa*, 39 FCC 2d 452 (1973); *Kenton and Bellefontaine, Ohio*, 3 FCC 2d 598 (1966). Second, we do not believe that changing the Station KWNG channel from Channel 288A to 290A would impose a hardship or result in disruption of service. This modification does not involve a transmitter site relocation. It will be necessary to change the crystal and possibly retune the antenna. It is our experience that these changes can be accomplished with a minimum of inconvenience or, if any, disruption of service. Sorenson has not submitted any facts that would cause us to alter this determination. In the present situation, we do not believe a Channel 288A operation at Red Wing should remain as an impediment to the future Channel 287C2 operation at Stewartville.

6. Accordingly, pursuant to Section 0.283 of the Commission's Rules, IT IS ORDERED, That the aforementioned petition for reconsideration filed by Sorenson Broadcasting Corporation IS DENIED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] On September 19, 1988, we released a *Report and Order* in MM Docket No. 87-310 granting the proposed Channel 290C2 upgrade at Red Wing and denying the Chippewa Falls upgrade proposal. 3 FCC Rcd 5553 (1988). Bushland Radio Specialities, licensee of Station WCFW, has filed a petition for reconsideration directed against that action.

[2] The Public Notice announcing the applications filing window for Stewartville indicated the possibility of an upgrade at that community. Public Notice dated May 12, 1988 (Report No. W-40). It further stated that if the upgrade proposal were adopted, applicants for the Class A channel would be required to amend their applications to specify the higher class channel and would be afforded cut-off protection.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-310

In the Matter of

Amendment of Section 73.202(b),	RM-5851
Table of Allotments,	RM-6121
FM Broadcast Stations.	
(Chippewa Falls, Wisconsin and	
Red Wing, Minnesota)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 2, 1989; Released: August 14, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Bushland Radio Specialties, licensee of Station WCFW, Channel 288A, Chippewa Falls, Wisconsin ("Bushland Radio"), directed against the *Report and Order* in this proceeding. 3 FCC Rcd 5553 (1988). The *Report and Order* substituted Channel 290C2 in lieu of Channel 288A at Red Wing, Minnesota, and modified the license of Station KWNG, Red Wing, Minnesota, to specify operation on Channel 290C2. In doing so, it also denied the Bushland Radio proposal to substitute Channel 291C2 in lieu of Channel 288A at Chippewa Falls, and modify the Station WCFW license to specify operation on Channel 291C2, as well as two requests by Bushland Radio for additional time to file reply comments in this proceeding. Sorenson Broadcasting Corporation ("Sorenson Broadcasting") filed an opposition to the petition for reconsideration and Bushland Radio filed a reply to the opposition. For the reasons discussed below, we will deny the petition for reconsideration.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Bushland Radio proposing the substitution of Channel 291C2 in lieu of Channel 288A at Chippewa Falls, and the modification of the Station WCFW license to specify operation on Channel 291C2. In response to the *Notice of Proposed Rule Making*, 2 FCC Rcd 5083 (1987), Sorenson Broadcasting Corporation, licensee of Station KWNG, Channel 288A, Red Wing, Minnesota, filed a counterproposal proposing the substitution of Channel 290C2 in lieu of Channel 288A at Red Wing, and modification of the Station KWNG license to specify operation on Channel 290C2. These mutually exclusive upgrade proposals were compartively considered under the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The priorities are as follows:

1) first full-time aural service;

2) second full-time aural service;

3) first local service; and

4) other public interest matters

[co-equal weight given to priorities 2 and 3]

In accordance with priority 4, we granted the upgrade at Red Wing. We specifically determined that the Red Wing upgrade would result in a service gain to 119,869 persons, while the Chippewa Falls upgrade would result in a service gain of 91,618 persons. As such, the Red Wing proposal was favored since it will provide service to the greatest number of persons. *See also, Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987), *aff'd. in relevant part*, 4 FCC Rcd 3843 (1989); *Albany, Georgia, Marianne and Quincy, Florida*, 4 FCC Rcd 2631 (1989).

3. In taking this action, we did not consider reply comments by Bushland Radio directed to the Red Wing counterproposal. In this regard, Sorenson Broadcasting filed the Red Wing counterproposal on October 9, 1987. This counterproposal was placed on *Public Notice* on October 16, 1987 (Report No. 1685), and a November 2, 1987,deadline was established for the filing of reply comments. Bushland Radio did not file its reply comments until November 4, 1987, and supplements to the reply were filed on November 5, November 10, and November 24, 1987. In its request for a two-day extension of time to file reply comments and a request for acceptance of late-filed reply comments, Bushland Radio refers to the October 31, 1987, illness of its "lead counsel." As stated earlier, the *Report and Order* denied these requests and the reply comments were not considered.

4. In support of its petition for reconsideration, Bushland Radio contends that the denial of its requests due to "emergency" medical reasons was arbitrary and capricious, and inconsistent with previous Commission actions. Bushland Radio also states that favorable action on these requests would not have delayed this proceeding or prejudiced any party.

5. After careful consideration of this matter we continue to believe that we afforded Bushland Radio adequate time to submit its reply comments by the prescribed November 2, 1987, deadline.[1] This conclusion is not altered by the fact that during the last two days prior to the November 2, 1987, date, the "lead counsel" for Bushland Radio became ill. However, in order to completely resolve this proceeding, we will dispose of the reply comments of Bushland Radio.[2]

6. In its reply comments, Bushland Radio asserts that its Chippewa Falls upgrade should be favored since it would provide a first fulltime local service to "Station WCFW's local community-Greater Chippewa Falls;" "Greater Chippewa Falls" is inhabited by approximately 10,000 more persons than "Greater Red Wing;" Chippewa Falls is a faster growing community than Red Wing with a larger educational system with a "stronger and more diverse economic base;" and Station WCFW "needs its proposed upgrade to maintain its economic viability" and thereby assure that "it can continue to serve the local programming needs of its community." For the reasons discussed below, we would not have favored the Chippewa Falls upgrade over the Red Wing upgrade.

7. First, Station WCFW is licensed to Chippewa Falls and not "Greater Chippewa Falls" which is not listed in the U.S. Census.[3] Furthermore, Station WCFW currently provides the requisite 70 dBu signal to all of Chippewa Falls. As such, upgrading Station WCFW will not provide a first local service. Both upgrades will provide additional service to their respective surrounding areas. Under priority 4, other public interest matters, we compared the populations in the respective gain areas. As indicated earlier, the Red Wing upgrade would provide service to approximately 28,251 more persons in its gain area. Such a comparison sets forth specific public interest benefits attributable to the rule making actions proposed, thereby enabling us to select between the two proposals using a rational basis. *See Stamps and Camden, Arkansas*, 3 FCC Rcd 3644 (1988). Contrary to the suggestion by Bushland Radio, there is no Commission precedent to override a determination based on the comparison of the gain area populations by a comparison of the populations of "Greater Chippewa Falls" and "Greater Red Wing" or the fact that Chippewa Falls may be a "faster" growing community. Such factors would only be relevant if we were comparing communities for a entirely new channel allotment, rather than an enhancement to an existing allotment. "Greater Chippewa Falls" will continue to receive service from Station WCFW even though we did not grant Bushland Radio an upgrade which would have resulted in service to the surrounding area. Finally, the Bushland Radio argument that a Station WCFW upgrade in needed to "maintain its economic viability" is unsupported and, in any event, would not be a basis for favoring its upgrade proposal over the Red Wing upgrade proposal which would provide service to a greater number of persons.

8. Accordingly, IT IS ORDERED, That the aforementioned petition for reconsideration filed by Bushland Radio Specialties IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] As stated earlier, the November 2, 1987, deadline to reply to the October 9, 1987 counterproposal by Sorenson Broadcasting afforded Bushland Radio 24 days to file reply comments. In addition, it should be noted that on September 28, 1987, Sorenson Broadcasting indicated in its service list that it served Bushland Radio with a copy of an identical Red Wing upgrade proposal it submitted in MM Docket No. 87-306 in connection with *Albert Lea, Minnesota*, 2 FCC Rcd 4616 (1987). This, in effect, afforded Bushland Radio an additional eleven days to prepare reply comments.

[2] We will also consider the "Response" by Sorenson Broadcasting to the late-filed reply comments.

[3] According to Bushland Radio, "Greater Chippewa Falls" includes the communities of Hallie, LaFayette, Tilden, Wheaton, Eagle Point, Anson, and parts of Howard and Woodmohr. It should be noted that Station WOGO is licensed to Hallie, Wisconsin and provides principal-city service to a significant portion of the area characterized by Bushland Radio as "Greater Chippewa Falls."

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-548

In the Matter of

Frequency Coordination
in the Private Land
Mobile Radio Services

NOTICE OF PROPOSED RULE MAKING

Adopted: August 2, 1989; Released: August 15, 1989

By the Commission:

I. INTRODUCTION

1. We undertake this proceeding to consider modifying the Rules governing frequency coordination in the private land mobile radio services. Based on the public comments we received on the Private Radio Bureau's November 1988 report on frequency coordination[1] and our experience since the current Rules went into effect in October 1986, we tentatively conclude that establishing an alternative to the frequency coordination program now in effect would be in the public interest. In this *Notice of Proposed Rule Making*, we propose to modify our Rules to provide applicants in the private land mobile radio services with alternative means of selecting frequencies on which to operate.

II. BACKGROUND

2. Spectrum allocated to the private land mobile radio services is used intensively by entities providing services essential to our daily lives. The private land mobile radio services include over twenty-five individual radio services or categories. The Commission generally has provided frequencies to enable public safety, industrial, land transportation, and commercial entities to satisfy their mobile communications requirements. Examples of the different radio services are the Police Radio Service, the Fire Radio Service, the Taxicab Radio Service, and the Business Radio Service.[2] Frequencies available to these services are located in the 30 MHz, 150 MHz, 450 MHz, 470 MHz, 800 MHz, and 900 MHz bands. In general, users must share frequencies below 800 MHz but can obtain exclusive licenses in a particular area for frequencies at 800 MHz or higher. In addition, frequencies in the 470-512 MHz band that are allocated to the private land mobile services are also available on an exclusive basis to private land mobile licensees.[3]

3. Over one million private land mobile licenses are currently in effect. In fiscal year 1988 over 336,000 private land mobile authorization requests were submitted to the Private Radio Bureau's licensing division in Gettysburg, Pennsylvania. Given the very large number of users, the sharing of frequencies is a critical element in the efficient use of the spectrum. Frequency selection is important to the efficient use of the spectrum and to ensuring a satisfactory grade of communications service to all users. Proper selection of a frequency can be accomplished only after a number of factors are considered, including the applicant's specialized communications requirements and the environment in which communications will be conducted.

4. Most users of private land mobile radio, however, do not actively participate in the frequency selection process. For them, communications is an incidental, but necessary, component of their primary activities. The typical private land mobile radio user relies on others such as mobile communication dealers or frequency coordinating committees to identify the best frequency on which to operate. The fact that the government's resources are limited militates against the Commission selecting frequencies for such a large number of applicants. This function has traditionally been absorbed by the private land mobile communications industry.

5. Prior to 1958, our Rules provided applicants with little guidance regarding the selection of frequencies. The Rules merely stated that frequencies were available on a shared basis and that applicants and licensees must cooperate in the selection and use of channels to minimize interference. To compensate for this lack of spectrum management guidelines, interested parties voluntarily formed frequency advisory committees to perform the task of frequency selection. For example, the Association of American Railroads provided this service as far back as the 1940s for applicants in the Railroad Radio Service. Applicants for licenses in radio services with frequency advisory committees relied on these volunteer organizations to recommend the best frequencies for their use.

6. In 1958, we amended our Rules to recognize the role of coordinating committees in the frequency selection process.[4] On request, these committees would recommend frequencies to applicants, and the Private Radio Bureau would consider those recommendations in its frequency assignment and licensing decisions. An applicant could, however, still make its own frequency recommendation to the Bureau by submitting a field study which, in pertinent part, was to consist of an analysis of the potential interference to licensees operating on the desired frequency within 75 miles of the applicant's proposed station. Our Rules, however, set forth no standards governing the content of such studies.

7. Congress addressed the role that the coordinating committees had assumed when it enacted the Communications Amendments Act of 1982.[5] In this Act, Congress recognized the value of the service that the committees provided to applicants and the Commission and specifically provided us with authority to continue using their services.[6] While endorsing the frequency coordinating committees, Congress encouraged the Commission to develop appropriate mechanisms to monitor their performance.

8. Following Congress's clarification of the role frequency coordinating committees can assume in the licensing process, we began a broad-ranging inquiry into the entire private land mobile frequency coordinating process.[7]

9. Based on the comments generated in the inquiry, we adopted a *Notice of Proposed Rule Making* on October 17, 1984, proposing a single coordinator per radio service and elimination of the field study. The proceeding was termi-

nated in 1986 with the adoption of the *Report and Order* and subsequent *Memorandum Opinion and Order*.[8] Through these actions, we certified one coordinating committee for each of the various private radio services or categories of services.[9] In addition to their frequency selection responsibilities, we also imposed on these coordinating organizations an obligation to provide their services on a non-discriminatory basis, to process and file applications with the Commission promptly,[10] to review applications for accuracy and completeness, and to assist in resolving post-licensing conflicts arising from their frequency recommendations. The coordinating committees were also required to develop and maintain reasonable and uniform fees, although an unspecified level of profit was permitted, to participate in interservice sharing requests, and to facilitate the use of new communication techniques when possible. We acknowledged our oversight responsibilities over the performance of the coordinating committees by stating that if the performance of a specific committee was consistently beneath the standards outlined in the *Report and Order*, an inquiry would be initiated that could lead to decertification of the committee. Finally, we eliminated the field study option of coordination as disruptive of the licensing process.[11] Therefore, with few exceptions, all applications were to be coordinated by the certified organizations.[12]

10. The certified frequency coordinators have produced a number of important benefits that facilitate the efficient licensing of private land mobile radio services. The coordinators have contributed to an improvement in the overall quality of applications as a result of their required review of certain data elements in the Form 574 application. This has resulted in fewer applications being returned to applicants for incorrect preparation. The improved applications have also reduced the administrative burden on our licensing staff and helped to prevent delays that could hinder the authorization of radio systems vital to the physical and economic well-being of the nation. In addition, the coordinators have been responsible for resolving post-licensing conflicts, thus reducing demands on our resources and freeing the staff to process licenses more expeditiously. Further, many coordinators offer application preparation assistance as an ancillary service and disseminate information regarding the private land mobile licensing process and Commission procedures to their members. We believe that these benefits have combined to enable the Bureau to maintain acceptable speeds of service over the past few years, despite significant resource constraints.

11. Despite these successes, we have received complaints addressing the performance of certain coordinating committees, as well as general complaints about the lack of an alternative means of coordination. We believed, however, that the coordinators should be given a sufficient period of time to adjust to the new rules and their new responsibilities before we reexamined the coordination program and considered any changes. Accordingly, after the process had been in effect for approximately one year, the Private Radio Bureau initiated a review of the coordinators' overall performance. On October 13, 1987, the Bureau requested information from all the coordinators to determine whether their performance met the specified requirements, particularly in regard to fees and speed of service.

12. After analyzing this information, the Private Radio Bureau prepared a report for the Commission that consolidated all available information regarding the frequency coordination process and the frequency coordinating committees.[13] Upon review of this report, on November 17, 1988, we instructed the Private Radio Bureau to solicit comments on the report in order to develop a comprehensive record and to assure a full airing of all issues and problems associated with the frequency coordination program. We were particularly interested in comments regarding several alternatives to the current frequency coordination structure that were outlined in the report. These included developing more specific standards for evaluating coordinator performance; establishing strict and detailed regulation of coordinators' fee levels; modifying the coordination requirements for applications involving interservice sharing; exempting certain classes of applications from the coordination requirement; allowing frequency recommendations to be developed through the use of field studies; permitting more than one certified coordinator in each radio service to perform frequency coordinations; and substituting the Commission for private coordinators in the private land mobile radio services.

13. We received 85 sets of comments and 40 sets of reply comments in response to the Bureau's Report.[14] The major points raised by the commenters are summarized below.

III. COMMENTS

14. We turn first to the comments filed by end users – entities that use the frequency coordinators to obtain frequency recommendations. These commenters both support and criticize the existing frequency coordination process. Those supporting the status quo argue that it is either unnecessary or premature for the Commission to make drastic changes at this time. *See, e.g.*, Comments of Lincoln Telephone and Telegraph Company at 3. For example, the Michigan State Police (MSP) and AACS Communications, Inc., state that coordinations are now much better than they were prior to the institution of mandatory frequency coordination and that no significant changes are needed. At most, they contend, only "fine tuning" is necessary. *See* MSP Comments at 1. MSP specifically opposes the "field study" or "multiple coordinator" options. MSP Comments at 2. *See also* Comments of the NYNEX Telephone Companies at 4-5.

15. A number of commenters also argue that the existing fees charged by most of the coordinators are reasonable. *See, e.g.* Comments of Burlington Northern Railroad at 1. Others, however, support vigorous Commission oversight of the frequency coordinators, particularly with respect to fees and speed of service. *See, e.g.*, Comments of the Union Pacific Railroad Company at 2-3. Other end users, while generally approving of present frequency coordination procedures, believe there is still room for improvement. For example, the County of Los Angeles Facilities Management Department (LAFMD) supports the reinstatement of field studies as an alternative to the existing process. Comments of LAFMD at 1.

16. End users who oppose the existing process criticized the fees charged by the frequency coordinators in relation to the coordination benefit received. *See, e.g.*, Comments of David L. Ingle, Robert J. Hajek, and State Wide Communications. Some of these commenters argue that fre-

quency coordination and assignment is fundamentally a function of government and that the Commission should perform them instead of the certified coordinators. *See, e.g.*, Comments of the National Ski Patrol (NSP) at 1. NSP also contends that in most instances, coordination is of less benefit than field monitoring because most coordinators' databases assume flat terrain when, in fact, the terrain is often mountainous or otherwise varied, resulting in differing propagation characteristics. NSP nonetheless recommends continued mandatory coordination in large SMSAs and urban and suburban areas.

17. The law firm of Brown and Schwaninger criticizes the existing frequency coordination structure and recommends that the Commission adopt one of three alternatives: active and effective regulation, including rate regulation, of frequency coordinators; institution of free and open competition in the provision of frequency coordination services; or the Commission's performing all frequency coordinations. Like NSP, several of the radio dealers also contend that the Commission should perform all frequency coordinations. *See, e.g.*, Comments of Richard L. Ott, dba Ott Communications at 1.

18. On the other hand, Carribbean Communications, Inc. (CCI), a two way radio dealer, criticizes the Commission for its continued involvement in frequency coordination matters when other more pressing issues face the agency. *See also* Comments of Helper Instruments Company. Other commenters, such as Spectrum Resources, Inc., assert that the Commission has received few complaints about the present coordination process due to fear of "rocking the boat." These commenters suggest that complaints about the performance of the certified coordinators is minimized because applicants, dealers and others must work with the coordinators on an ongoing basis to process new applications. Still other commenters argued that coordination should not be required where the applicant makes minor modifications to an existing license which is assertedly not spectrum-affecting, such as moving control points. *See, e.g.*, Comments of Texas Communications Co. at 1.

19. Some of the commenters in this category, such as Teletech, Inc., and Electrocom, Inc., supported field studies, but with tightened standards for their performance and implementation, *e.g.*, mandatory notification to all co-channel licensees. Teletech states, however, that its preferred approach is free competition in the offering of coordination recommendations to license applicants, subject to certain minimal qualifications by the Commission of frequency coordinators. Teletech argues that a common database is unnecessary for the multiple coordinator method to work because a "coordinator who keeps a poor or outdated database will surely find itself without clients." Comments of Teletech, Inc. at 13. Moreover, Teletech asserts that free competition would also relieve the Commission from having to oversee the fees charged by coordinators since that function would be resolved by marketplace forces.

20. James A. Kay, Jr. (Kay) dba Lucky's Two Way Radio, filed comments oppossing multiple coordinators as impractical. Kay supports reinstating the field study option, providing that the Commission establishes standards or requirements for such studies. Kay also contends that many radio users and radio shops refuse to pay the fees currently charged by coordinators and operate their radio systems without licenses, taking their chances on FCC enforcement action. In their comments, Beltronics, Inc. and Earl's Two Way Radio and Electronics also assert that some individuals engage in unlicensed operations to avoid paying the charges for frequency coordination. *See* Comments of Beltronics at 2, Comments of Earl's at 4. Similarly, Electrocom, Inc., while generally supportive of the coordination process, maintains that fees are too high. Electrocom Comments at 5.

21. Most of the coordinators state that the present process is working well, although some fine tuning may be appropriate. *See, e.g.*, Comments of the Associated Public-Safety Communications Officers, Inc. (APCO) at 1-2, and the National Association of Business and Educational Radio (NABER) at iii. Similarly, the American Petroleum Institute (API) noted that the small number of complaints made regarding the existing process relative to the number of coordinations performed is indicative of the general success of our frequency coordination program. Nevertheless, some of the certified coordinators, including the Association of American Railroads (AAR), NABER, and the Special Industrial Radio Service Association (SIRSA) state that carefully controlled field studies could co-exist with the present coordination processes. AAR Comments at 13-16; NABER Comments at 36-37; SIRSA Comments at 26-34. Other coordinators, however, oppose field studies and none of the coordinators filing comments support the creation of a multiple coordinator option. *See, e.g.*, Comments of APCO, the Forestry Conservation Communications Association, and American Trucking Association, Inc.

22. One of the most detailed proposals for a revised field study option was provided by SIRSA. SIRSA suggests that an applicant submitting a field study in lieu of a recommendation from a certified frequency coordinator be required to do the following things:

- file direct access applications (i.e., those which are not coordinated) with the Commission's Gettysburg offices and at the same time serve a copy of the application on all coordinators responsible for the frequency requested in the application;
- list all licensees located within a 75 mile radius of all proposed stations or modified fixed stations;
- provide the total number of licensed mobile transmitters, base stations, temporary stations and fixed stations located within a 75 mile radius of the proposed stations;
- provide a statement explaining why a particular frequency was chosen;
- list all the coordinators served with a copy of the application and the date they were served;
- in those instances where co-channel and adjacent channel clearance is required, demonstrate that concurrence was received.

23. Under SIRSA's proposal, coordinators would have twenty calendar days from the date of receipt of the application to concur with the frequency requested or to explain to the Commission why the selected frequency is unacceptable. Deficient applications would be returned to the applicant and the Commission would be the final arbiter of acceptability. SIRSA also proposes that if the Commission finds that a particular source of applications based on field studies is providing inferior service, it accept no further applications from that preparer. Finally,

SIRSA contends that even if we decide to reinstate the field study option, we should not permit the use of the field study alternative in support of applications for frequencies above 800 MHz. SIRSA comments at 32-34.

24. Teletech contends that the present frequency coordination process is flawed and that the introduction of competition to existing frequency coordinators will not only further improve the quality of applications submitted to the Commission but will also conserve scarce Commission resources. It notes that the field study option previously permitted by the Commission was really a misnomer because there was rarely any field work performed. Teletech Comments at 7. It further argues that prior criticisms that field studies caused disruptions to the licensing process could easily be resolved by requiring an applicant to submit a copy of his application to the appropriate coordinator prior to filing it with the Commission.

25. As for criticisms that the field studies submitted to the Commission in the past were of poor quality, Teletech states that because the Commission imposed only minimal standards for such field study applications, the Commission is partly responsible for the poor quality of such applications. Teletech argues that with a genuine field study, where co-channel and adjacent channel licensees receive written notice of that study, all parties concerned would have the opportunity to coordinate CTCSS tones and methods of operation. *See* Teletech Comments at 10. Teletech's preferred approach, however, is for the Commission to certify any responsible entity as a frequency coordinator for a period of two to three years.

26. Motorola, Inc., a major land mobile equipment manufacturer, states that too little time has elapsed to permit a fair evaluation of the present coordination process and that too little effort has been expended on fine tuning and improving the process. Motorola Comments at 1-2. Motorola observes that the issues raised in the *Bureau Report* were exhaustively dealt with in Docket No. 83-737 (the frequency coordination proceeding) and that, with the exception of fees, the *Bureau Report* indicates that the performance of the coordinators has been very satisfactory in terms of speed and quality. Motorola indicates that the coordinators are willing to work informally with the Commission to rectify any excessive fees, and that this approach should be explored before new or alternative modes of frequency coordination are proposed.

27. Some commenters suggested an entirely different approach to the questions raised in the *Bureau Report*. For example, Raymond P. Awe, Communications Engineer, argues for opening all frequencies for use by all land mobile services, the FCC creating a master frequency usage database, allowing access to this master database by radio shops for a fee, and allowing radio shops to perform frequency selection and licensing of end users. Comments of Raymond P. Awe at 1-2. The comments of Merrill T. See argue for abandonment of the block allocation system except in public safety and governmental frequencies, and instituting "free enterprise coordination." Similarly, Alan Rutz argued that the Commission should request competitive bids from third parties to perform coordinations. Comments of Alan Rutz dba Community Systems Company (Rutz) at 4.[15]

28. As noted in their reply comments, many user organizations believe that the frequency coordination process has been a success and that it is either unnecessary or too early to make substantial changes. *See, e.g.*, Reply Comments of the State of Connecticut. They argue that any changes should be limited to fine tuning or focusing on narrow problems areas. *See* Reply Comments of NABER at 1, International Association of Fire Chiefs, Inc./International Municipal Signal Association at 12, and API at 4. In its reply comments, SIRSA urges the Commission to exercise increased oversight over coordinator fees and to require annual reports and audits from these coordinators. AAR and Brown and Schwaninger are in accord with this position, as is APCO, which also suggests the Commission should provide more guidance to coordinators. AAR Reply Comments at 2, Brown and Schwaninger Reply Comments at 5-8, APCO Reply Comments at 9.

29. A number of parties filed reply comments supporting a circumscribed field study alternative. *See* Reply Comments of NABER at 3, Reply Comments of Kay at 2-3, Reply Comments of LAFMD at 2-4. Other reply commenters specifically support SIRSA's field study proposal. *See, e.g.*, Reply Comments of the American Iron Ore Association at 5, Reply Comments of the Florida Fruit and Vegetable Association at 5, Reply Comments of the New England Fuel Institute at 5. Teletech, Inc. and Brown and Schwaniger also suggest that any field study standards that we adopt should also be applicable to the frequency recommendations of the certified frequency coordinators.

30. On the other hand, the Texas Chapter of APCO and Orange County filed reply comments opposing a field study option. Reply Comments of the Texas Chapter of APCO at 4, Reply Comments of Orange County at 3. In their reply comments, the Ohio Chapter of APCO and the American Association of State Highway and Transportation Officials (AASHTO) oppose the multiple coordinator option. Reply Comments of Ohio Chapter of APCO at 4, AASHTO at 3-4. Teletech, Inc. reiterates its support of multiple coordinators. Reply Comments of Teletech, Inc. at 21-22. Finally, NYNEX and the International Taxicab Association state that if we decide that it is necessary to make changes to the coordination process, these changes apply only to those services where problems are perceived to have occurred. *See, e.g.*, Reply Comments of the NYNEX Telephone Companies at 2; Reply Comments of the International Taxicab Association at 2.

IV. DISCUSSION

31. Almost three years have passed since we implemented the new frequency coordination requirements. In that time, the frequency coordination process has helped to improve the efficiency of our application processing. Typical speeds of service are now below 30 days. Considering the additional responsibilities given to coordinators, the complexity of the frequency coordination process in an increasingly congested radio environment, and the large number of coordinations processed by coordinators since the inception of the new coordination rules, we are highly pleased with the overall operation of the current frequency coordination procedures.

32. Based on the audit, the *BureauReport* and the comments submitted thereto, we conclude that we should not undertake a major restructuring of the existing frequency coordination process. As discussed above, the certified coordinators handle thousands of applications yearly in an expeditious manner and, through their review and dispute resolution responsibilities, facilitate the prompt licensing

of private land mobile services. Although the process is working well, however, our oversight responsibilities require us to develop a more certain means of assuring that coordinator performance is satisfactory, particularly with respect to the fees charged for coordination services.

33. In its report, the Bureau suggested several alternatives to the existing coordination program: stricter performance standards, fee regulation, exempting some applications from the coordination requirements, field studies, multiple coordinators, and Commission coordination. The Bureau's audit of the coordinators demonstrated that an enhanced oversight program would require much more extensive and resource intensive procedures to monitor more precisely the performance of the frequency coordinators. In particular, a program to regulate the coordination fees charged by the certified coordinators would require the development of detailed cost accounting rules, cost allocations, depreciation schedules, and allowable expenses and periodic review of each coordinator's compliance with those standards; in short, a regulatory structure much like that used in traditional rate regulation. In addition, we would either have to establish the allowable profit the coordinators would be permitted to earn on their investment in plant and equipment devoted to frequency coordination[16] or examine permissible profit levels on a case-by-case basis. This would, of course, require a substantial ongoing commitment of Commission resources.

34. Given that the total income of the entire coordination industry is approximately six million dollars annually,[17] we should look carefully at the extent to which it is in the public interest to commit substantial amounts of this Commission's limited staff resources for a regulatory initiative that would be likely to effect only relatively small changes in the fees charged to most coordination customers. Moreover, such regulation is inconsistent with our general preference for promoting competition as a means of assuring pricing discipline in lieu of complex and intrusive regulatory requirements.[18] A mechanism to assure that frequency coordination fees are no higher than necessary, however, would alleviate many of the concerns regarding the certified coordinators. A large number of comments to the *Bureau Report* support some type of alternative to the use of the exclusive frequency coordinator in each private land mobile radio service. Thus, we tentatively conclude that we can better achieve our oversight objectives regarding coordinator fees and performance through authorizing alternative means of obtaining a frequency recommendation than through additional regulation.

35. As noted in the *Bureau Report*, the Bureau does not recommend Commission coordination as a feasible alternative. We concur fully with that assessment. The current and projected budget climate precludes Commission assumption of any additional administrative responsibilities in the area of frequency coordination. The multiple coordinator alternative is also problematic. We received few applications in response to our solicitation when we initially certified a frequency coordinator in each private land mobile radio service.[19] Nevertheless, the coordinator selection process was time-consuming, even though, in many cases, there was only one applicant that would clearly satisfy the Congressional guideline that coordinators be representative of the users in a particular radio service. Thus, even if we certify additional coordinators, applicants in each and every radio service will not necessarily have more than the current coordinator with which to deal. On balance, therefore, we look at this time to a broader-based, easier-to-implement marketplace alternative that would be available to each applicant. We are not, however, foreclosing consideration of a multiple coordinator option at a later time.

36. While most of the comments on the *Bureau Report* spoke only in general terms, SIRSA proposed an alternative under which an applicant could obtain its own frequency recommendation and apply directly to the Commission. Under this proposal, an applicant could file directly with the Commission if certain specified information were included in the application package and a copy of the application were provided to the appropriate frequency coordinator at the same time. In essence, this proposal offers a field study alternative to use of the certified coordinators.

37. We tentatively conclude that authorizing a field study or direct access alternative to the existing frequency coordinators is warranted. This approach would resolve the fee regulation issue by allowing end users who have concerns about coordinators' fees to develop their own recommendations in support of their applications, or to obtain recommendations from a third party, and file directly with the Commission. This alternative may also allow actual local operating conditions for each channel to be more fully examined, as opposed to merely relying on a national database and associated loading counts. We take this opportunity, however, to point out that competitive alternatives do not imply low cost, low quality coordinations. The alternatives proposed may cost more or less than the the certified coordinators are now charging. Nevertheless, benefits may be derived from allowing the alternatives.

38. Given all of the factors considered herein, the alternative coordination options would improve the frequency coordination process by enabling end users to choose from among competitive means of obtaining frequency recommendations. At the same time, this approach would have only a limited impact on our resources. Accordingly, we propose a direct access application process as an alternative to using the certified coordinators, as set forth below. In addition, we also propose to allow use of actual field monitoring to select the best available channel as a second alternative in support of a direct access application.

39. *Direct Access Applications*. As a threshold matter, we note that SIRSA proposes that any direct access application alternative be limited to applications for channels below 800 MHz. SIRSA states that these channels are generally assigned for the exclusive use of single licensees within defined geographic areas. It contends, therefore, that it is critical that the coordinators maintain up-to-the minute data bases for each frequency above 800 MHz. SIRSA comments at 34. We propose that direct access applications be accepted only for frequencies below 800 MHz. We seek comments, however, as to whether it is in the public interest to authorize direct access applications for frequency assignments above 800 MHz. In addition, we propose that direct access applications be allowable for all applications for all services currently subject to the frequency coordination requirement. We solicit comments, however, on whether we should exclude selected services from the direct access application alternative. Fi-

nally, we are excluding from any consideration in this proceeding the SMR pool frequencies, as those frequency selections are already made by the Commission.

40. Secondly, we believe that initially authorizing direct access applications as a two year pilot program would serve the public interest. In the past, as many commenters recognized, such "field study" applications were often problematic and hampered the efficient processing of applications. *See e.g.*, Reply Comments of Teletech at 20-21. It appears, however, that many of these problems resulted from the lack of meaningful guidelines covering the submission of such applications. The direct access application guidelines we discuss below should cure many of the shortcomings previously associated with field studies and should facilitate the submission of accurate, properly completed and supported applications. Authorizing this approach on a two-year basis initially will allow us to evaluate the success of this alternative and to assess its impact on our resources and procedures before committing to a permanent alternative to the certified coordinators. If, however, we find at any time during the two-year period that the impact on our resources or on the application process generally is unduly adverse, we propose to reserve the right to terminate the program on 30 days notice without further proceedings. We seek comment on this issue.

41. As a preliminary matter, we propose that any type of direct access application be marked "DIRECT ACCESS APPLICATION" at the top of the Form 574 in bold capital letters. This will enable the staff to identify these applications quickly so that they can check the requirements that are specific to these types of applications. In addition, copies of all direct access applications (with all exhibits) would be served on all coordinators responsible for coordinating use of the frequencies being sought by an applicant at the time the application is filed with the Commission. Therefore, we would amend Section 90.127 of our Rules, 47 C.F.R. § 90.127, to permit the direct submission of such applications, with the required fee, in accordance with Section 0.401(b) of the Rules, 47 C.F.R. § 0.401(b).[20]

42. We would require direct access applicants to list all co-channel licensees located within a 75-mile radius of all proposed stations or modified fixed stations, as suggested in SIRSA's proposal. The purpose of this requirement would be to show that the applicant is fully aware of the communications environment in which it proposes to operate and has considered the operations of such co-channel licensees in developing its frequency request. This list would be appended to the application as a clearly marked, separate exhibit titled "Co-Channel Licensees" and would provide the names, addresses and call signs of these licensees as well as the source from which this information was derived. Any direct access application that did not include such an exhibit would be considered defective and dismissed.[21]

43. We also seek comment as to whether we should specify that the co-channel licensee information be compiled within a certain time period, *e.g.*, no more than 30 days, prior to the filing of the direct access application. The purpose of such a requirement would be to assure that the list of co-channel licensees is as current as practicable.

44. SIRSA proposes that the direct access applicant also provide in its application the total number of licensed mobile transmitters, base stations, temporary stations and fixed stations within a 75-mile radius of the proposed stations. We expect that applicants will make reasonable attempts to review such information in the process of selecting the best available frequency. We question, however, whether providing this level of disaggregated information to the Commission would materially improve our ability to process these applications. Accordingly, we solicit comment on whether loading information should be required of direct access applicants and, if so, what specific information should be included. Commenters may also wish to discuss whether it would be unduly costly or burdensome for the direct access applicant to obtain this information.

45. We would also require that the direct access applicant provide a statement explaining why a particular frequency was chosen. Such a statement would be useful in that it would indicate the engineering or other assessment that the applicant undertook in its frequency selection. For example, it might indicate that the applicant selected the least congested frequency or one that is used by other compatible users, or that local propagation characteristics support the indicated choice. It might also indicate that the applicant had obtained the consent of all nearby co-channel users. This statement would be provided in narrative form as a separate, clearly marked exhibit, entitled "Reason for Choosing Frequency." If the direct access applicant proposes to use a frequency through intercategory sharing, the applicant should first describe what efforts were made to obtain a suitable frequency in its own service category and demonstrate that there were no suitable frequencies available in its own service category. It should also demonstrate why the frequency applied for was selected out of those available in the service category from which the frequency was selected. Finally, if the direct access applicant uses the monitoring process discussed below to select a frequency, the monitoring process and the results thereof should be summarized briefly in this exhibit.

46. We also believe that the direct access applicant itself should be responsible for resolving post-licensing conflicts. We require the certified coordinators to attempt to resolve post-licensing conflicts[22] and we tentatively conclude that applicants choosing the direct access alternative should have the same responsibility. Accordingly, we solicit comments on this issue, particularly, whether we should by rule specify the extent of such responsibility.

47. We would also require, as suggested by SIRSA, that the direct access applicant provide an additional exhibit marked "CERTIFICATION" in which it certifies that it has transmitted the application to all of the coordinators having responsibility for that particular application. Specifically, we propose that the applicant certify that he knows who the coordinators are for the frequencies he is applying for, that he provide a list of the names and addresses of the coordinators contacted, and that he certify that the coordinators have been provided with a copy of the application at the same time that the application was filed with the Commission. Any direct access application that does not contain this certification will be dismissed as defective.[23]

48. SIRSA proposes that in those instances where co-channel and adjacent channel clearance is required, the direct access applicant demonstrate that concurrence was received. We agree with this suggestion and would require the direct access applicant to bear the burden of determining whether such clearance is in fact required.[24] In

the event such clearance is required, written evidence of such concurrence would be provided as part of FCC Form 574 as a clearly marked separate exhibit entitled "Required Concurrences." This exhibit should contain the names of the licensees giving such concurrences and the call signs of the stations involved. In the event the applicant determines that no such concurrences are required, he or she should state "None" under the "Required Concurrences" exhibit.

49. Under SIRSA's proposal, coordinators would have twenty calendar days from date of receipt of the application to concur with the application or indicate why the selected frequency is unacceptable. We propose that written notice of a coordinator's objections be filed with and received at the Bureau by the end of the 30-day public notice period, as discussed in n. 20, *supra*. In cases where more than one coordinator must be contacted, each coordinator's objections, if any, would have to be filed during the public notice period. Failure of a coordinator to object within the prescribed time limits would be construed as concurrence with the frequency selected.

50. We believe that the guidelines and requirements proposed above would, if adopted, provide for a practicable, reliable direct access alternative to the existing frequency coordination processs. This alternative should not have a negative impact on the ability of the certified coordinators to continue to process the vast majority of applications expeditiously and with few problems and would offer a competitive option to applicants. We emphasize that an applicant's failure to provide the information required would result in the return of its application and loss of the application fee. Moreover, in proposing a two-year test program, we are providing incentives for application preparers to deliver high quality applications or risk termination of the direct access application option. At the same time, however, we remain concerned that we have some means to address the problem of a direct access application preparer submitting consistently inferior applications. We can decertify a coordinator for poor performance, and perhaps should have a similiar sanction available for direct access application preparers. We seek comment, therefore, on possible approaches to this issue, including case-by-case enforcement action, barring future applications by a particular preparer,[25] or other suggestions that would assure the quality and reliability of direct access applications.

51. Our experience is that the existing application coordination process has generally resulted in the submission of higher quality applications and thus has speeded service to the public by reducing processing times. The certified coordinators, as noted above, are called upon to do much more than just select a frequency for the applicant. They are required to review Items 1 through 25 of FCC Form 574 for completeness and accuracy. Accordingly, we would expect applicants and third party preparers to comply with the straightforward guidelines for direct access applications that we have proposed, and to take reasonable steps to assure the completeness and accuracy of the entire Form 574, especially Items 1 through 25.[26] We will not hesitate to dismiss or return applications submitted with errors. Further, to the extent that direct access applications have an adverse impact on our overall private land mobile licensing speed of service, we shall reevaluate the efficacy of continuing this option.[27]

52. *Monitoring*. The second alternative to the current frequency coordination procedures on which we solicit comments involves the use of monitoring as a basis for selecting a frequency.[28] Monitoring involves actual field observation of a proposed frequency to determine the extent to which it is being used in a specific geographic area.[29] For monitoring to be considered an adequate substitute for a database search, it would be necessary that it be done in such a way that the results reasonably reflected actual usage of a particular frequency in an area. The results of monitoring could vary greatly depending on such variables as the location and height of the antenna being used, the gain of the antenna, the sensitivity of the receiver being used, the time of day, the day of the week, or even the season. The most useful monitoring would entail setting up equipment that replicates, to the maximum extent possible, the operating parameters of the proposed radio system. Once the monitoring equipment has been installed, it then becomes a question of when to monitor to develop an accurate picture of frequency usage. It is impossible to specify a single set of monitoring requirements that is equally valid for monitoring all frequencies in all bands in all geographic areas. To fail to specify any specific requirements, however, could result in monitoring results that are not representative of the current radio environment. Therefore, we propose the following requirements regarding monitoring and ask for comments on our proposal as well as on whether it is necessary to specify monitoring parameters at all.

53. We propose to require that any applicant using monitoring to select a private land mobile frequency do so at a location as close to the proposed system base station transmitter site as possible, with a receiver and antenna that reasonably parallel the operating parameters of the proposed system. We also propose that the monitoring be done for a minimum of four business days, over a two week period. Further, monitoring should be done in such a way that each transmit frequency (*i.e.*, each base and mobile output frequency) is monitored for a minimum of 25 percent of the normal business hours of the applicant on each of the four days. We have proposed these minimum requirements as adequate to reasonably approximate actual usage of the frequency. We believe that the proposed monitoring parameters represent a reasonable balance between imposing extensive and potentially expensive requirements on the applicant, and the need to assure that the overall quality of frequency selections does not decrease as a result of the addition of a monitoring alternative. The applicant would be required to maintain the raw monitoring data and to make it available to the Commission on request. The actual application procedures would parallel those for the database search alternative, with the applicant certifying, in addition, that the monitoring requirements had been fulfilled.

V. CONCLUSION

54. In conclusion, the current frequency coordination process relying on exclusive frequency coordinators has been highly successful. Application accuracy and quality have improved markedly since the exclusive coordinators were certified and made responsible, among other things, for checking Items 1 through 25 on the Form 574. As a result, we have been able to process private land mobile applications more efficiently and effectively. Despite the success of the current frequency coordination process,

however, we believe there is a significant public interest benefit to be gained by authorizing the direct access application alternatives discussed above. In weighing the various options available to us, we tentatively conclude that authorizing competitive approaches to frequency selection is preferable to imposing more stringent regulations on the certified frequency coordinators. Even though we anticipate that most applicants will continue to use the certified coordinators for their radio services, the availability of alternatives should serve to further improve the overall performance of and level of satisfaction with the frequency selection process.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action

55. The Commission proposes to amend its rules to provide applicants in the private land mobile radio services with alternative means of selecting frequencies on which to operate. The proposals are intended to give applicants the flexibility to choose the mechanism to be used in frequency selection and, in so doing, to reduce the amount of required Commission oversight of the exclusive frequency coordinating committee in each radio service.

B. Legal Basis

56. The proposed action is authorized under Sections 4(i), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(a).

C. Reporting, recordkeeping and other compliance requirements

57. Applicants that choose to submit applications directly to the Commission will have to provide additional information as discussed in the above proposals.

D. Federal rules which overlap, duplicate, or conflict with this rule.

58. None

E. Description, potential impact, and number of small entities affected.

59. The Commission expects the proposals to be beneficial to small entities that currently have no alternative means of applying for a private land mobile radio license.

F. Any significant alternative minimizing the impact on small entities and consistent with the stated objectives.

60. All significant alternatives have been addressed in the *Notice*. Further, this item is intended to minimize the regulatory burdens to our licensees, many of whom may be considered small business entities.

VII. PAPERWORK REDUCTION ACT STATEMENT

61. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and contain new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and may increase burden hours imposed on the public. Implementation of new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VIII. PROCEDURAL MATTERS

62. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

63. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion to the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

64. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Interested persons may file comments on or before **December 1, 1989**, and reply comments on or before **January 12, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the report and order.

65. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless

of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTS

AACS Communications, Inc.

Adams Electronics Co.

American Newspaper Publishers Association (ANPA)

American Petroleum Institute (API)

American Trucking Associations, Inc. (ATA)

Associated Public-Safety Communications Officers, Inc. (APCO)

Association of American Railroads (AAR)

Raymond P. Awe

John Barnes

Bell Communications, Inc.

BellSouth Corporation

Beltronics, Inc.

Brown and Schwaninger

Burlington Northern Railroad

California Public-Safety Radio Assoc. (CPRA)

Carribean Communications, Inc.

Taylor Chism, Chism Communications

Donald R. Clark, Don Clark Radio Communications

Barry W. Collins, Collins Communications

Robert E. Cranmer, Primus Electronics Corporation

Robert T. Day, Day-Comm Corp.

Christopher J. Deluge, TRA Electronic Communications, Inc.

Steven G. Earl, Earl's Two Way Radio & Electronics

Electrocom, Inc.

Frederick Electronics, Inc.

John Fassotte, Northern Electronic Design/Communications System, Inc.

Federal Express

Federal Licensing, Inc.

Forest Industries Telecommunications (FIT)

Forestry Conservation Communications Assoc. (FCCA)

GE Mobile Communications (GE)

Richard E. Hafla, Teton Communications, Inc.

Robert J. Hajek, Riverside, IL

Helper Instruments Co, Indian Harbour Beach, FL

Ingle, Dover, OK

International Assoc. of Fire Chiefs, Inc. and International Municipal

Signal Assoc. (IAFC/IMSA)

International Taxicab Association (ITA)

Robert W. and Marjorie H. Jensen, Electronic Service

James A. Kay, Jr., Lucky's Two-Way Radio

Jeffrey Kowalczyk

John Landsberger, Brodie Communications

Kevin Lausman, Communications Service Center

Lincoln Telephone and Telegraph Co. (LT&T)

Eldon Lindquist, Communications Center, Inc.

Long Island Rail Road (LIRR)

County of Los Angeles, Facilities Management Dept.

Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC)

Mayer Radio, Inc.

Michigan State Police

Mitchell Energy & Development Corp.

Motorola, Inc.

National Association of Business and Educations Radio, Inc. (NABER)

Northwest Radio C & E, Inc.

NYNEX Telephone Companies

J. L. Orysen, Slims Electronics

Richard C. Ott, OTT Communications

Russell J. Ott, Comtronix Corp.

Fred Palidor, Palidor Radio Communications Consultants Ltd.

Don W. Patrick, Patrick Electronics, Inc.

Donald L. Petrone, Petrone Communications

Francis M. Plass, Frank's Radio Service

Albert Spencer Porter, Communications Specialists, Inc.

Patrick C. Riggin, Riggin Communications

Alan Rutz, Community Systems Company

H. Dave Schmidtke, Dave's Electronic Service

Merrill T. See

Special Industrial Radio Service Association, Inc. (SIRSA)

Spectrum Resources, Inc.

State Wide Communications

David Stevenson, Communication Services, Inc.

Telephone Maintenance Frequency Advisory Committee (TELFAC)

Teletech, Inc.

Walter A. Tilleman, Texas Communications Co.

Union Pacific Railroad Co.

United States Telephone Assoc. (USTA)

Utilities Telecommunications Council (UTC)

Ronald Van Hoven, Lakeshore Electronics

Jim Van Sky, Big Country Communications

Jim Van Wienen, NTC Electronics Inc.

Mike Vande Voort, VVortech Inc.

Douglas O. Vines, Spectrum Communications, Inc.

Dale Walsh, Irving, TX

Hollis E. Whitney, HEW Communications, Inc.

Richard S. Woolf, National Ski Patrol System, Inc.

Xerox Corp.

LIST OF REPLY COMMENTS

Alliance of Motion Picture and Television Producers (AMPTP)

American Association of State Highway and Transportation Officials, Special

Committee on Communications (AASHTO)

American Iron Ore Association

American Mining Congress

American Petroleum Institute (API)

Association of American Railroads (AAR)

Association Public-Safety Communications Officers, Inc. (APCO)

Brown and Schwaninger

State of Connecticut Bureau of Statewide Emergency Telecommunications

Dodge County, WI Sheriff's Dept.

Express Radio, Inc.P

Florida Fruit and Vegetable Association

Forest Industries Telecommunications (FIT)

Gary A. Green, Richmond, VA

International Association of Fire Chiefs, Inc., and International Municipal

Signal Association (IAFC & IMSA)

International Taxicab Association, Inc. (ITA)

James A. Kay, Jr., Lucky's Two-Way Radio

County of Los Angeles

Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC)

National Association of Business and Educational Radio, Inc. (NABER)

National Food Processors Associaiton

National Propane Gas Association

National Ready Mixed Concrete Association and National Aggregates Association

National Utility Contractors Association

New England Fuel Institute

NYNEX Telephone Companies

Ohio Chapter, Associated Public Safety Communications Officers, Inc.

County of Orange, California

Palidor Radio Communications Consultants Ltd.

Eileen See, C & E Service Co.

Merrill T. See

Special Industrial Radio Service Association, Inc. (SIRSA)P

Suffolk County Police Department

Teletech, Inc.

Texas Chapter, Associated Public-Safety Communications Officers, Inc.

United Parcel Service of America, Inc.

United States Telephone Association

Utilities Telecommunications Council (UTC)

Ronny Whites, Ron Whites Equipment

Xerox Corporation

APPENDIX B

Parts 0 and 90 of Chapter 1 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

1. The authority citation for Part 0 continues to read as follows:

Authority: 47 U.S.C. 154, 303 unless otherwise noted. Implement 5 U.S.C. 552, unless otherwise noted.

2. The authority citation for Part 90 is modified to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; 47 U.S.C. §§ 154, 303, and 332 unless otherwise noted.

3. Section 0.401(b)(4) is amended to remove the "Note" prior to (i) in its entirety.

4. In Section 90.7, a new definition is added in alphabetical order to read as follows:

§ 90.7 Definitions.

* * * * *

Frequency Coordination. Frequency coordination is the process of identifying for an applicant the best available frequency in the private land mobile radio services. This can be accomplished by obtaining a frequency recommendation from one of the Commission's certified frequency coordinators, or by determining usage by co-channel licensees through a database search or monitoring.

* * * * *

5. Section 90.127 is amended by revising paragraphs (a) and (a)(1) to read as follows:

§ 90.127 Submission and filing of applications.

(a) All applications for private land mobile licenses that require fees as set forth at Part 1, Subpart G of this chapter and that require frequency coordination shall, after coordination and attachment of the statutory fee, be forwarded to the appropriate address as specified in §0.401(b) of the rules.

(1) All applications for private land mobile licenses that require frequency coordination but not a fee shall, after coordination, be forwarded to Federal Communications Commission, Gettysburg, PA 17326.

* * * * *

6. Section 90.135 is amended by revising paragraph (c) to read as follows:

§ 90.135 Modification of license.

* * * * *

(c) Unless specifically exempted in §90.175, requests for modifications listed in paragraph (a) of this section must be submitted on Form 574 with evidence of frequency coordination.

* * * * *

7. Section 90.175 is amended by revising the introductory paragraph and paragraphs (a), (b), (c) and (d), redesignating existing paragraphs (e) and (f) as (f) and (g) and adding new paragraph (e) to read as follows:

§ 90.175 Frequency coordination requirements.

Except for applications listed in paragraph (g) of this section, each application for a new frequency assignment, for a change in existing facilities as listed in §90.135 (a), for a reinstatement of an authorization expired for more than 6 months, or for operation at temporary locations in accordance with §90.137, must include a showing of frequency coordination as set forth below.

(a) For frequencies between 25 and 470 MHz.

(1) A statement from the applicable frequency coordinator recommending the most appropriate frequency. The coordinator's recommendation may include comments on technical factors such as power, antenna height and gain, terrain, and other factors that may serve to mitigate potential interference. Except for narrowband operations, the coordinator must not recommend any adjacent channel frequency 15 kHz removed from existing stations that would result in a separation of less than 10 miles, or 7 miles in the Taxicab Radio Service. If the frequency recommended is in the 150-174 MHz band, and is 17.5 kHz or less removed from a frequency that is available to another radio service, the coordinator's statement must show that approval has been received from the coordinator of the other service. Coordination with another service is not required, however, for narrowband assignments more than 5 kHz removed from other narrowband assignments; or,

(2) Clearly marked attachments to Form 574 that include the following information: a separate exhibit entitled "Co-channel Licensees" that provides the name, address, and call sign of each co-channel licensee located within a 75 mile radius of all proposed stations or modified fixed stations and the source and date of this information; a separate exhibit entitled "Reason for Choosing Frequency" that provides, in narrative form, an explanation why a particular frequency was chosen; a separate exhibit entitled "Certification" that provides the names and addresses of the coordinator(s) contacted and certification that the appropriate coordinator(s) has been provided with a copy of the application at the same time it was filed with the Commission; and a separate exhibit entitled "Required Concurrences" in which the applicant is responsible for determining if co-channel or adjacent channel licensee concurrence is required and, if so, providing written evidence of such concurrence; if no concurrences are required, the applicant should state "None" on this exhibit; or,

(3) Clearly marked attachments to Form 574 that include the following information: a separate exhibit entitled "MONITORING REPORT" that specifically describes which frequencies were monitored, the location and equipment used, and a demonstration that monitoring was done for each base and mobile transmit frequency for a minimum of four business days, over a two week period, in such a way that each transmit frequency is monitored for a minimum of 25 percent of the normal business hours of the applicant on each of the four days; a separate exhibit entitled "Reason for Choosing Frequency" that provides, in narrative form, an explanation why a particular frequency was chosen; a separate exhibit entitled "Certification" that provides the names and addresses of the coordinator(s) contacted and certification that the appropriate coordinator(s) has been provided with a copy of the application at the same time it was filed with the Commission; and a separate exhibit entitled "Required Concurrences" in which the applicant is responsible for determining if co-channel or adjacent channel licensee concurrence is required and, if so, providing written evidence of such concurrence; if no concurrences are required, the applicant should state "None" on this exhibit.

(b) For frequencies between 470 and 512 MHz:

(1) A statement from the applicable coordinator recommending specific frequencies that are available for assignment in accordance with the loading standards and mileage separations applicable to the specific radio service or category of user involved; or,

(2) Clearly marked attachments to Form 574 that include the following information: a separate exhibit entitled "Co-channel Licensees" that provides the name, address, and call sign of each co-channel licensee located within a 75 mile radius of all proposed stations or modi-

fied fixed stations and the source of this information; a separate exhibit entitled "Reason for Choosing Frequency" that provides, in narrative form, an explanation why a particular frequency was chosen; a separate exhibit entitled "Certification" that provides the names and addresses of the coordinator(s) contacted and certification that the appropriate coordinator(s) has been provided with a copy of the application at the same time it was filed with the Commission; and a separate exhibit entitled "Required Concurrences" in which the applicant is responsible for determining if co-channel or adjacent channel licensee concurrence is required and, if so, providing written evidence of such concurrence; if no concurrences are required, the applicant should state "None" on this exhibit. Further, each application must demonstrate conformance with the requisite loading, co-channel separation, and protection criteria, as specified in § 90.303 and § 90.307; or,

(3) Clearly marked attachments to Form 574 that include the following information: a separate exhibit entitled "MONITORING REPORT" that specifically describes which frequencies were monitored, the location and equipment used, and a demonstration that monitoring was done for each base and mobile transmit frequency for a minimum of four business days, over a two week period, in such a way that each transmit frequency is monitored for a minimum of 25 percent of the normal business hours of the applicant on each of the four days; a separate exhibit entitled "Reason for Choosing Frequency" that provides, in narrative form, an explanation why a particular frequency was chosen; a separate exhibit entitled "Certification" that provides the names and addresses of the coordinator(s) contacted and certification that the appropriate coordinator(s) has been provided with a copy of the application at the same time it was filed with the Commission; and a separate exhibit entitled "Required Concurrences" in which the applicant is responsible for determining if co-channel or adjacent channel licensee concurrence is required and, if so, providing written evidence of such concurrence; if no concurrences are required, the applicant should state "None" on this exhibit.

(c) For frequencies between 806-824/851-869 MHz and 896-901/935-940 MHz: A statement from the applicable coordinator recommending specific frequencies that are available for assignment in accordance with the loading standards and mileage separations applicable to the specific radio service or category of user involved.

(d) For frequencies in the 929-930 MHz band, a statement from the coordinator recommending the most appropriate frequency.

(e) Any recommendation submitted in accordance with paragraphs (a), (b), (c) or (d) of this section is advisory in nature and is not an assurance that the Commission will grant a license to operate on that frequency. Therefore, applicants are strongly advised to wait until they obtain a valid authorization from the Commission before purchasing radio equipment to operate on specific frequencies.

* * * * *

8. Section 90.176 is amended by revising paragraphs (a)(1), (a)(3), (b)(1) and (b)(3) to read as follows:

§ 90.176 Interservice sharing of frequencies in the 150-174 and 450-470 MHz bands.

(a) * * *

(1) Evidence that there are no satisfactory frequencies available within the applicant's own radio service in the desired area of operation:

(2) * * *

(3) A statement from the frequency coordinator having responsibility for coordination in the radio service or group in which the frequency is assigned concurring in its assignment in the manner requested or, a statement from all users operating less than 5 kHz from the proposed station within 75 miles and in the 150-174 MHz band from all licensees within 35 miles of the proposed station on a frequency 17.5 kHz or less removed that they concur in the assignment of the requested frequency. In cases where concurrence is not given, the coordinator or licensee must provide an explanation of the reasons sharing is inappropriate.

* * * * *

(b) * * *

(1) Evidence that there are no satisfactory frequencies available within the applicant's own radio service in the desired area of operation:

(2) * * *

(3) A statement from the frequency coordinator having responsibility for coordination in the radio service or group in which the frequency is assigned concurring in its assignment in the manner requested, or a statement from all users operating less than 5 kHz from the proposed station within 75 miles and in the 150-174 MHz band from all licensees within 35 miles of the proposed station on a frequency 17.5 kHz or less removed that they concur in the assignment of the requested frequency. In cases where concurrence is not given, the coordinator or licensee must provide an explanation of the reasons sharing is inappropriate.

* * * * *

9. Section 90.275 is revised in its entirety to read as follows:

§ 90.275 Selection and assignment of frequencies in the 421-430 MHz band.

Applicants must specify the frequencies on which the proposed system will operate.

10. Section 90.277 is amended by revising paragraphs (a) and (b) to read as follows:

§ 90.277 Interpool sharing of 421-430 MHz frequencies.

* * * * *

(a) There are no satisfactory channels in the applicant's own pool, as determined by the frequency coordinator for that pool or based on a detailed showing by a direct access applicant; and

(b) Channels in the pool from which the applicant wishes to obtain a channel must be available in the proposed area of operation.

11. Section 90.494 is amended by revising paragraph (b) to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

* * * * *

(b) All applications for these frequencies must comply with the frequency coordination requirements of §90.175(d).

* * * * *

12. Section 90.607 is amended by revising paragraph (e) to read as follows:

§ 90.607 Supplemental information to be furnished by applicants for facilities under this subpart.

* * * * *

(e) Except for applicants requesting frequencies in the SMRS category listed in § 90.617(d) and § 90.619, all applicants for frequencies governed by this subpart must comply with the frequency coordination requirements of § 90.175.

FOOTNOTES

[1] Report to the Commission on Frequency Coordination in the Private Land Mobile Services, PR Docket No. 88-548, Nov. 17, 1988 (*Bureau Report*).

[2] The eligibility requirements and operating standards for the private land mobile radio services are contained in Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.1 - 90.657.

[3] The 470-512 MHz band is shared in eleven major metropolitan areas between the land mobile services and the UHF-TV service. The rules pertaining to the use of this band by the private land mobile services are contained in Subpart L of Part 90. *See* 47 C.F.R. §§ 90.301 - 90.315.

[4] In the Matter of Amendment of Part 11, Rules Governing the Industrial Radio Services, To Delete, Modify and Create Services and To Effect Changes in the Availability of Frequencies, First Report and Order, Docket No. 11991, 23 Fed. Reg. 4784 (1958).

[5] The Communications Amendments Act of 1982, P.L. 97-259, 96 Stat. 1087, September 13, 1982. Section 331 of the Communications Act of 1934, as amended, is codified at 47 U.S.C. § 332.

[6] *Id.*

[7] Notice of Inquiry, PR Docket No. 83-737, 48 Fed. Reg. 35149 (August 3, 1983).

[8] *See* Report and Order in PR Docket No. 83-737, 103 FCC 2d 1093 (1986), *recon. denied*, Memorandum Opinion and Order, PR Docket No. 83-737, 51 Fed. Reg. 36013 (October 8, 1986), 61 RR2d 148.

[9] Four entities requested certification to coordinate applications in the Local Government Radio Service; three entities requested certification to coordinate applications in the Special Emergency Radio Service and the 800 MHz conventional, SMR and trunked pools; two entities requested certification to coordinate applications in the Police, Fire, Highway Maintenance, Forestry Conservation, Motion Picture, and Relay Press Radio Services, the 800 MHz Business, Industrial/Land Transportation, and Public Safety/Special Emergency pools, and the 900 MHz paging pool; one entity requested certification to coordinate applications in the Petroleum, Forest Products, Special Industrial, Manufacturers, Telephone Maintenance, Business, Power, Motor Carrier, Railroad, Taxicab, and Automobile Emergency Radio Services. There are two exceptions to the one coordinator per service decision - the general access pool of frequencies in the 470-512 MHz band and the 150 channels at 800 MHz available for conventional use only. Generally, all Part 90 eligibles have access to these bands, and applications are coordinated by the applicant's primary service coordinator. The responsibilities associated with coordinating these frequencies, therefore, rest with more than one coordinator.

[10] The coordinators were required to process 90% of the applications they receive within twenty business days. *See* Report and Order in PR Docket 83- 737 at 1108.

[11] *Id.* at 1125-26. We eliminated field studies because, in the absence of defined standards, the quality of submitted field study reports varied widely. In addition, under then-existing procedures, the Commission notified the coordinators that a field study application had been filed. During the period between filing and notice to a coordinator, the coordinator could recommend the same frequency resulting in our processing two inconsistent applications simultaneously. As discussed below, our alternative frequency selection proposal would resolve both of these concerns.

[12] Certain applications are exempted from the frequency coordination requirement. *See* 47 C.F.R. § 90.175.

[13] *See* n. 1, *supra*.

[14] Appendix A contains a list of parties filing comments and reply comments.

[15] In addition, Rutz, Jeffrey Kowalczyk and Merrill *See* argue that the present frequency coordination process violates federal civil rights law by forcing citizens to access the Commission through and to pay money to frequency coordinators. Comments of Jeffrey Kowalczyk at 2. *See also* Comments of Alan Rutz at 2-3, Comments of Merrill T. *See* at 17.

[16] *Bureau Report* at para. 33.

[17] *Id.* at Appendix B. The Bureau's projection of its audit data indicated that the entire coordination industry has an income of less than six million dollars. Only four coordinators show incomes over $500,000 and most coordinating committees are under $100,000.

[18] In the common carrier area, for example, we have limited our rate regulation of services where there are competitive providers and no one carrier possesses market power. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980). Thus, while we engage in detailed ratemaking with regard to the monopoly local exchange carriers, we forbear from such regulation of most carriers providing competitive common carrier services. Moreover, rate of return regulation might have the unintended result of higher fees for coordinations if the coordinators can justify higher fees while still not exceeding a rate of return prescription.

[19] *See* n. 9, *supra*.

[20] We would also require direct access applicants to demonstrate, upon request, that they provided copies of their applications to the responsible certified coordinators. Applicants would be required to produce, upon request, the return receipts from registered or certified mail, a receipt for hand delivery or other equivalent proof that a copy of the application had been delivered to the certified coordinators.

[21] Some commenters suggested that a direct access applicant provide co-channel licensees with written notice of its application. We tentatively conclude such notice is unnecessary. Our purpose in requiring an applicant to identify all co-channel licensees within 75 miles is to ensure that the applicant knows of the existence of such licensees and therefore does not inadvertently or intentionally request a frequency assignment that will cause harmful interference to them. Requiring submission of the described list achieves this objective. It is unlikely that actual notice to licensees would advance compliance with our coordination goals significantly. We propose, however, to place these direct access applications on 30-day public notice to allow existing licensees an opportunity to comment.

[22] *See* Report and Order in PR Docket No. 83-737, at par. 26.

[23] We are not proposing any changes in the requirement that the certified coordinators keep master databases of existing and pending applications. Accordingly, the coordinators will have to update their databases to account for the direct access applications. We question whether this obligation would result in users of the certified coordinators subsidizing the direct access application process. On the other hand, such users have an interest in and will themselves benefit from an accurate database. We request comments on whether it would be appropriate to allow the certified coordinators to recover a nominal fee for carrying out their database maintenance obligations with regard to direct access applications. Commenters may wish to indicate what amount, if any, is appropriate. We also request comment as to whether processing direct access applications will impose greater burdens on the Commission than processing coordinated applications and, if so, whether direct access applications should be assessed a higher application fee.

[24] *See* Sections 90.173(f) and 90.239(c)(3)(ii) of the Rules.

[25] SIRSA suggests that we bar future applications from a particular third party preparer of direct access applications who we find is providing inferior service. *See* Comments of SIRSA at 33.

[26] In this regard, applicants and third party preparers should be cognizant of Section 90.205(a) of the Rules which states that applicants must specify no more power than the actual power necessary for satisfactory operation.

[27] Teletech and Brown and Schwaninger urge that any standards for direct access applications should be imposed on existing coordinators as well. We do not propose such a blanket requirement. The coordinators maintain databases that enable them to identify co-channel licensees. A direct access applicant might not choose to use such a database, but the Commission would nonetheless want some assurance that the frequency requested by the direct access applicant was not chosen carelessly or at random. Although it seems unlikely that an applicant would apply for a useless frequency, we prefer to move cautiously at this juncture. If experience demonstrates that some of the requirements imposed only on direct access applicants are unnecessary, we would consider relaxing these requirements. We request comment on this issue.

[28] Monitoring is now used by some applicants to help select the best available frequency. To the extent that monitoring can improve the frequency selection process and thereby improve overall spectrum efficiency, we encourage applicants to use it. We do not, however, propose to impose any specific requirements on applicants who use monitoring as an adjunct to either the use of a certified frequency coordinator or the direct access application alternative.

[29] Applicants are reminded that § 705 of the Communications Act, 47 U.S.C. 605 is applicable to the interception of private land mobile communications. Thus, while these radio communications may be monitored, their disclosure or beneficial use is prohibited.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-218

In the Matter of

Amendment of Section 73.202(b), RM-6232
Table of Allotments,
FM Broadcast Stations.
(Statesboro, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1989; Released: August 15, 1989

By the Chief, Allocations Branch:

1. At the request of Radio Statesboro, Inc., (petitioner) the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3076 (1988), proposing the substitution of Channel 261C2 for Channel 261A at Statesboro, Georgia, and the modification of its license for Station WMCD(FM) to specify the higher powered channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 261C2 to Statesboro since it could provide that community with its first wide-area coverage FM service, which will improve WMCD's service to the entire Statesboro area. Channel 261C2 can be allotted to Statesboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.4 kilometers (0.9 miles) northeast, at the petitioner's current transmitter site.[1]

3. As requested, we are modifying the license of Station WMCD(FM) to specify operation on Channel 261C2 in lieu of Channel 261A in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 29, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Statesboro, Georgia	261C2, 275A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WMCD(FM), Statesboro, Georgia IS MODIFIED, to specify operation on Channel 261C2 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 32-27-21 and West Longitude 81-46-27 with a site restriction.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-518

In the Matter of

Amendment of Section 73.606(b), RM-6123
Table of Allotments,
TV Broadcast Stations.
(Yreka City, California; Medford, Oregon[1])

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1989 **Released: August 15, 1989**

By the Chief, Allocations Branch:

1. The *Notice of Proposed Rule Making*, 3 FCC Rcd 6456 (1988), in this proceeding, issued in response to a petition filed on behalf of Junko and Bobby C. Shehan ("petitioners"), proposed the substitution of UHF television Channel *35 for vacant Channel *20 at Yreka City, California. Petitioner filed comments in response to the *Notice*, as did the National Association of Public Television Stations.

2. Petitioner's proposal was premised on a desire to use their intended application site for Channel 27 at Medford, Oregon,[2] an allotment for which they are the sole applicants. The application contravenes the minimum distance separation requirements of Section 73.610 of the Commission's Rules with regard to Channel *20 at Yreka City.[3] Thus, the proposed substitution of UHF television Channel *35 was requested for Channel *20 at Yreka City to negate the short-spacing.

3. The *Notice* advised that the Commission does not generally substitute a higher reserved UHF channel for a lower one to accommodate a commercial interest elsewhere, absent a special public interest justification to support an exception to that policy. Since petitioner's proposal was premised on a desire to use a preferred antenna site for commercial use, they were advised that was not a sufficient basis to warrant the requested substitution at Yreka City. Consequently, petitioners were requested to demonstrate that other sites were unavailable in Medford to accommodate its application for Channel 27, and also, how, and to what extent, the public interest would benefit from the requested substitution at Yreka City.

4. Although NAPTS comments concur with the Commission's policy barring relocation of a reserved allotment to a higher UHF channel to accommodate a commercial operator, it believes the requested substitution may allow greater flexibility in site selection for public television use at Yreka City since the present allotment of Channel *20 is constrained by the site restriction required on Channel 27 at Medford, Oregon.

5. In their comments, petitioners have revised their proposal, which does not require a change at Yreka City. Instead, they seek the substitution of Channel 26 for Channel 27 at Medford, Oregon. We will invite comments on the proposed substitution of channels at Medford.

6. Commission policy generally affords cut-off applicants protection from the filing of competing applications. Since petitioners presently have cut-off protection, and the proposed Channel 26 is mutually exclusive with Channel 27, if Channel 26 is ultimately substituted for Channel 27 at Medford, petitioners will be permitted to amend their application to specify the new frequency without losing their protected status. *See, Lander, Wyoming*, 46 Fed. Reg. 39605 (1981). In this manner, the processing of petitioners' application could continue without delay in order to facilitate their desire to initiate service to Medford at the earliest possible date.

7. A staff engineering analysis reveals that Channel 26 may be substituted for Channel 27 at Medford at the petitioners' application site,[4] consistent with the minimum distance separation requirements of the Commission's Rules.

8. In view of the above, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with regard to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Medford, Oregon	5,*8+,10+, 12+,27	5,*8+,10+, 12+,26+

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **October 6, 1989,** and reply comments on or before **October 23, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, as follows:

Junko and Bobby C. Shehan
2032 Amsterdam Lane
Modesto, CA 95356

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and

such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] This community has been added to the caption.

[2] Coordinates specified in petitioner's application (BPCT-871002KI) are 42-17-54 and 122-44-59.

[3] Coordinates for Channel *20+ at Yreka City, California, are 41-43-49 and 122-38-15.

[4] Coordinates at the application site specified for Channel 27 at Medford are 42-17-54 and 122-44-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-358

In the Matter of

Inquiry into alleged abuses of
the Commission's processes by
applicants for broadcast
facilities

ORDER

Adopted: August 4, 1989; Released: August 15, 1989

By the Commission:

1. The Commission has under consideration information indicating that its processes may have been abused by Sonrise Management Services, Inc. (SMS). The information before the Commission raises serious questions as to whether SMS, its applicants, and their attorneys, consultants and advisors have engaged in a pattern of conduct which constitutes an abuse of the Commission's processes and may also constitute a violation of the Criminal Code. In view of the number of applicants created by SMS, we believe that consideration of its activities in a single investigatory proceeding is warranted to consider whether there have been such violations. *See* Section 403 of the Communications Act of 1934, as amended. In this regard, we note that, although issues concerning SMS's involvement in an applicant have been specified in numerous proceedings,[1] they have not yet been resolved because of subsequent dismissal of the SMS applicant prior to decision on the merits of the issues. Without examining the nature of SMS's activities with respect to any currently pending application, it is appropriate for the Chief, Mass Media Bureau to develop a record fully considering all aspects of SMS's activities with respect to any and all applications that have been dismissed and that are no longer the subject of a pending or proposed hearing proceeding.

2. ACCORDINGLY, IT IS ORDERED, that, pursuant to Section 5(c)(1) of the Communications Act of 1934, as amended, for the purpose of this inquiry authority is hereby delegated to the Acting Chief Administrative Law Judge of the Commission to require by subpoena the production of books, papers, correspondence, memoranda and other records deemed relevant to this inquiry; to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence; and to perform such other duties in connection therewith as may be necessary or appropriate to the compilation of a complete record concerning the subject matter of this inquiry.

3. IT IS FURTHER ORDERED, that the Acting Chief Administrative Law Judge is specifically authorized to designate a Commission Administrative Law Judge to exercise the authority conferred by this Order, and to require witnesses to testify and produce evidence under authority of, and in the manner provided in, Section 409 of the Communications Act of 1934, as amended, when requested to do so by Commission Counsel.

4. IT IS FURTHER ORDERED, that the subpoena power delegated by the Order shall be exercised in accordance with Sections 1.331 through 1.340 of the Commission's Rules. Motions to quash or limit subpoena shall be directed to the presiding Administrative Law Judge in accordance with Section 1.334 of the Rules.

5. IT IS FURTHER ORDERED, that the provisions of Section 1.27 of the Commission's Rules shall apply to the production of oral and documentary evidence under subpoena.

6. IT IS FURTHER ORDERED, that the presiding Administrative Law Judge is directed to complete the investigation as expeditiously as possible so that a final report can be promptly submitted by the Chief, Mass Media Bureau to the Criminal Division of the Department of Justice for its consideration of whether prosecution is warranted.

7. IT IS FURTHER ORDERED, that the investigation conducted pursuant to 47 U.S.C. § 403 and this Order shall be non-public.

8. IT IS FURTHER ORDERED, that upon conclusion of the inquiry ordered herein, the presiding Administrative Law Judge shall certify the record for submission to the Department of Justice in conjunction with the report to be submitted by the Chief, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *E.g.*, Solana, Florida, MM Docket No. 87-464.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-467

In the Matter of

Amendment of Part 97 of the
Commission's Rules to permit use
of the 17 meter band by the
Amateur Radio Services.

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 15, 1989

By the Commission:

I. INTRODUCTION

1. On January 31, 1989, we released a *Report and Order*[1] that authorized access to the 17 meter band[2] to all General, Advanced and Amateur Extra Class operator licensees. Dennis Murphy has requested reconsideration of the Commission's refusal also to allow access to the 17 meter band by Novice and Technician Class operators.

II. BACKGROUND

2. The 17 meter band is one of three new high frequency (HF) bands allocated to the amateur service by the 1979 World Administrative Radio Conference.[3] The allocation for the 17 meter band generally followed the pattern of the amateur service rules for the seven other HF bands, with operating privileges based on the class of operator license, separation of analog and digital emission types, and maximum transmitter power.

III. PETITION FOR RECONSIDERATION

3. The petitioner asks that the 18.068-18.110 MHz segment of the 17 meter band, where telegraphy (A1A) and digital (F1B) emission types are permitted for stations with higher grade control operators, also be authorized with a 200 watt power limit for amateur stations whose control operators hold either a Novice or Technician Class operator license. Mr. Murphy states that there should be equal access to the 17 meter band by all amateur operator classes in order to enhance amateur station participation in the use of the 17 meter band. The American Radio Relay League, Inc., filed an opposition to the petition for reconsideration noting that the Commission had thoroughly considered the matter of access to the band by license class.

IV. DECISION

4. The petitioner has not presented any facts or arguments that have not previously been considered. In fact, we discussed at length in our *Report and Order* the operator license classes that should be allowed access to the new 17 meter band, and concluded, *inter alia*, that Novice and Technician Class operators should be excluded from the 17 meter band in view of the enhanced privileges that they had recently received and because of the band's small size. In addition, we reiterate our belief that the potential for interference in the 17 meter band will be minimized if the skills associated with the General Class or higher operator license are required.[4]

V. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED, pursuant to the authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the petition for reconsideration IS DENIED.

6. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Report and Order, 4 FCC Rcd 1424 (1989).

[2] The frequencies between 18.068 MHz and 18.168 MHz are commonly referred to in the amateur community as the 17 meter band.

[3] *See* Final Acts of the World Administrative Radio Conference (Geneva 1979).

[4] Report and Order, *supra*, at paragraphs 6 and 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BEASLEY RADIO COMPANY — File No. BMPH-860818IC

For Modification of a Construction Permit for WDMT(FM)
Cleveland, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 16, 1989

By the Commission:

1. The Commission has under consideration: (i) an Application for Review, filed March 3, 1987, by Elyria Lorain Broadcasting Company ("Elyria"), licensee of WBEA(FM), Elyria, Ohio, of an action by the Chief, FM Branch, dismissing Elyria's Informal Objection to the subject application for modification of a construction permit filed by Beasley Radio Company ("Beasley"), former licensee of WDMT(FM), Cleveland, Ohio[1]; (ii) a request for an extension of time to file an opposition to the Application for Review, filed by Beasley March 16, 1987; (iii) Beasley's Opposition to the Application for Review, filed on March 23, 1987; (iv) a Petition for Stay of the grant of the subject application and an Application for Review of that staff action, filed by Elyria on July 30, 1987; (v) an Opposition to the Motion for Stay, filed by Beasley, August 7, 1987; (vi) an Opposition to Elyria's second Application for Review, filed by Beasley, August 19, 1987; and (vii) various related pleadings.

2. *Background*. WDMT was licensed as a superpower Class B station, authorized to operate with an effective radiated power ("ERP") of 70 kW with an antenna height above average terrain ("HAAT") of 119 meters. Such a station is known as a superpower Class B facility because it is authorized to operate at a power greater than that generally allowed Class B stations under Commission rules. WDMT's licensed facility is also short-spaced to WBEA but this spacing is "grandfathered" pursuant 47 C.F.R. § 73.213 since both stations were authorized prior to adoption of the minimum distance separation requirements.

3. On February 22, 1982, the Commission granted Beasley's application (File no. BPH-810522AJ) for a construction permit ("1982 CP") to change WDMT's transmitter site, decrease its ERP to 12.3 kW, and increase its HAAT to 232 meters. The changes authorized by the 1982 CP, particularly the increased HAAT, were designed to overcome shadowing problems the station encountered due to terrain in the area. The transmitter site specified in the 1982 CP was fully-spaced when it was authorized, but became short-spaced to WBEA by approximately 10 km when the Commission adopted new metric separation standards and HAAT/ERP restrictions for the various classes of stations. *See Report and Order* in BC Docket 80-90, 94 FCC 2d 152 (1983), *recon. granted in part*, 97 FCC 2d 279 (1984). The ERP and HAAT specified in the 1982 CP are below the maximum allowed for Class B stations. While constructing the facilities authorized by the 1982 CP, Beasley was advised by its engineer that WDMT'S signal would better cover its community of license if it utilized a directional antenna and increased its power to the maximum allowed for Class B stations under 47 C.F.R. § 73.211. Consequently, on August 18, 1986, Beasley filed a minor modification application (File no. BMPH-860818IC)("1986 modification application") to modify the 1982 CP to increase power and operate with a directional antenna.

4. On September 25, 1986, Elyria filed a petition to dismiss or deny the 1986 modification application asserting that the proposed facility: (i) would violate § 73.211(c), which prohibits stations operating with facilities in excess of those specified in § 73.211(b) from increasing their ERP or extending their 1 mV/m field strength contour beyond the location permitted under their authorizations; and (ii) would violate § 73.316(b) because the proposed directional antenna was employed as a means of reducing minimum mileage separation requirements. Because a petition to deny does not lie against an application for minor change in the facilities of an authorized station (*see* 47 U.S.C. §309 (c)(2)(A)), Elyria's petition was treated as an informal objection and, on February 6, 1987, was dismissed by the Chief, FM Branch, as meritless because: (i) Beasley's proposal was clearly within the power/height limits specified in § 73.211(b); (ii) the directional antenna was not employed for the purpose of reducing the mileage separation requirement and thus did not violate the rules.[2] On March 3, 1987, Elyria filed an Application for Review of the dismissal of its informal objection. On July 16, 1987, Beasley's 1986 modification application was granted ("1986 CP"), and Elyria filed an Application for Review of that grant on July 30, 1987.

5. *The Applications for Review*. Elyria requests that its second Application for Review be consolidated with its first Application for Review and treated as a single request for relief. Because the legal issues and discussion presented are the same in both of Elyria's Applications for Review, Elyria's request will be granted and the two pleadings will be consolidated.

6. Elyria requests review of the following four questions by the Commission: (i) whether the staff erred in concluding that the 1986 modification application was in compliance with Section 73.211(c) and, if so, whether the staff's refusal to dismiss or deny Beasley's application would constitute prejudicial error; (ii) whether, in the event Beasley's 1986 CP complies with Section 73.211(c), the staff acted arbitrarily and capriciously in refusing to impose conditions upon the construction of the requested facilities that would safeguard the signal of Elyria's station; (iii) whether, in light of the data from the field measurements taken as a cooperative venture between Beasley and Elyria, the staff's action should be set aside, and the construction permit rescinded; and (iv) whether Beasley's 1986 CP should be rescinded because Beasley failed to disclose in its application for license to cover the 1982 CP (File no. BLH-870220KG) that it had installed as an omnidirectional antenna the same antenna it proposes to use as a directional antenna.

7. *Section 73. 211 (c)*. Elyria contends that Beasley's 1986 CP is in direct conflict with Section 73.211(c) of the Commission's Rules because the proposal would extend

Beasley's 1 mV/m contour toward WBEA. The dispute at issue arose when Beasley filed the 1986 modification application, proposing an increase in WDMT's power and use of a directional antenna. While Elyria does not dispute the Bureau's position that § 73.211(c) does not apply to stations operating within the maximum facilities specified for their class in § 73.211(b), Elyria maintains that this position necessarily assumes that the station complies with the minimum distance separation requirements adopted in BC Docket 80-90 and specified in § 73.207. Since, however, WDMT's site does not meet the minimum distance separation requirements of § 73.207, Elyria asserts that the FM Branch incorrectly ruled that Beasley's 1986 modification application met the requirements of § 73.211(b) and therefore was not subject to the restrictions set forth in § 73.211(c). In essence, Elyria argues that the power and height restrictions set forth in § 73.211(b) apply only to those stations that satisfy the minimum distance separation requirements specified in § 73.207 and that any power and antenna height increases for short-spaced stations are governed by 73.211(c).

8. Elyria's argument is unsupported by case law, Commission rule or policy. Neither the express nor implied terms of § 73.211 suggest that stations operating at less than the minimum distances specified in § 73.207 are prohibited from extending their 1 mV/m contours beyond the location permitted by their present authorization. Section 73.211(c) restricts the extension of a station's 1 mV/m contour only if the station is operating with facilities in excess of the power and height limitations set forth in § 73.211(b). Since Beasley's 1986 modification does not specify facilities in excess of those permitted in § 73.211(b), this application is not subject to the restrictions of § 73.211(c). Furthermore, we note that even if Beasley were subject to the restrictions of § 73.211(c), the 1986 modification application would still be acceptable because WDMT's 1 mV/m contour would not be extended beyond the 1 mV/m contour authorized by the station's license. Finally, our ruling in this case is not altered by the fact that WDMT's transmitter site (originally authorized in the 1982 CP) is now short-spaced to WBEA's transmitter site because Beasley was authorized to operate from the site specified in the 1982 CP and 1986 CP prior to adoption of the new distance separation requirements in BC Docket 80-90, and has been "grandfathered" at this site without any restrictions on its ERP or HAAT beyond those specified in 73.211(b). *See* 97 FCC 2d at 287.

9. Further, we are not persuaded by Elyria's contention that the staff's refusal to impose the specific conditions requested by Elyria on the 1986 CP was arbitrary and capricious. Elyria's purpose in seeking these conditions on any construcion permit issued Beasley for directional operation is to ensure proper installation of the antenna in order to protect WBEA. The staff imposed conditions on the 1986 CP which are routinely imposed on any facility which proposes to operate with a directional antenna and that are designed to ensure proper installation of the antenna. *See* Construction Permit Authorization (File no. BPH-860818IC) (July 16, 1987) at 6. Before program tests are authorized for any directional facility the permittee must submit the results of a complete proof-of-performance to establish that the radiation characteristics of the antenna are within the limits proposed in the construction permit. This condition ensures that the signals of other stations will remain protected to the extent that they are protected by the Commission's technical rules. Thus, we believe that WBEA's signal will be adequately protected by the conditions imposed on Beasley's modification proposal.

10. *Signal Contour and Antenna Issues*. The two remaining issues posed by Elyria involve the operation of Beasley's station under the 1982 CP and not the 1986 modification application. Elyria submits an engineering study that purports to establish discrepancies between the predicted field strength of Beasley's signal as reported in its application for the 1982 CP and recent actual measurements of Beasley's station signal, and contends that Beasley's 1986 modification application should be rejected based on its findings. Finally, Elyria alleges misconduct on Beasley's part for utilizing as an omnidirectional antenna the same antenna it intends to modify and use as a directional antenna in the event its modification application is granted. 47 C.F.R. § 1.115(c) provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Since the circumstances giving rise to Elyria's final two arguments did not occur until after denial of Elyria's informal objection, the proper course for Elyria to have taken in this instance was the filing of a petition for reconsideration with the Mass Media Bureau. *See* note to 47 C.F.R. § 1.115(c). Nevertheless, in spite of this procedural deficiency, in the interest of clearly resolving the issues in this proceeding we will consider Elyria's final two arguments rather than dismiss them.

11. Elyria claims that the actual field strength measurements it submits demonstrate that the 1982 CP results in a 1 mV/m contour which slightly exceeds the predicted 1 mV/m contour specified in the application for that CP and therefore WDMT should be restricted from further increasing its radiation toward WBEA. Elyria also claims that because the actual field strength measurements taken with WDMT operating pursuant to the 1982 CP demonstrate that the station's 1 mV/m contour will extend 52.4 kilometers, the 1986 CP proposes facilities which will result in a 1 mV/m contour which slightly exceeds the maximum contour distance permitted by § 73.211(b)(52 kilometers). But Elyria concedes that under the Commission's rules, measurements are not acceptable as a means of defining the location of the service contour. Further, § 73.211(b)(2) provides that where a station's HAAT exceeds the maximum for its class, the station's ERP must be reduced so that the *predicted* distance to the 1 mV/m contour does not exceed the maximum class contour distance. Under the 1986 CP, the predicted contour for WDMT with the facilities specified in the 1986 modification application does not exceed the maximum class contour distance. Therefore, that proposal does not violate § 73.211(b) of the rules and Elyria's claim therefore is without merit.

12. Elyria's final argument is that inconsistencies exist between information contained in the license application to cover the 1982 CP and the 1986 modification application. Elyria states that the license application to cover the 1982 CP failed to disclose that the antenna employed for omnidirectional operation is the same antenna specified in the 1986 modification application for directional operation, and asserts that this fact is significant because the cover letter to the 1986 modification application suggested that different antennas would be used for the two operations. Elyria concludes that Beasley has been improperly using a directional antenna under its non-directional au-

thorization and that such conduct is, at best, "desingenuous" and, at worst, a "deliberate misrepresentation." Beasley responds that it did not make any misrepresentation to the Commission because at the time the 1986 modification application was filed Beasley had not yet decided whether it would use an antenna for its directional operation different from the antenna it had already tested for its non-directional operation (which could be modified to obtain a directional pattern). Because Beasley wished to avoid the installation of an antenna which might be replaced in the near future if the 1986 modification application were granted, Beasley's cover letter to that application requested expedited consideration to minimize any delays in construction which might result by the substitution of antennas. Upon the filing of Elyria's objection to the 1986 modification application, Beasley decided to use the same antenna for either directional or non-directional operation with the necessary modifications. Beasley further maintains that it has not engaged in any misconduct or violated any Commission rules in its operation under the 1982 CP. The license application filed on February 20, 1987, to cover the 1982 CP reflects that Beasley's operation is consistent with its non-directional authorization. That the cover letter to Beasley's 1986 modification application indicated that a different antenna would be utilized if that application were granted does not raise a substantial and material question of misrepresentation. There is no evidence of intent (or even possible motive) to deceive the Commission; it appears that Beasley simply changed its mind. Moreover, there was no improper operation because use of the one antenna would comply with the terms of both the directional and non-directional authorizations and the Commission's rules.

13. Thus, we conclude that the staff correctly ruled that Beasley's modification application complied with Section 73.211(c) and that Elyria's signal is safeguarded by the conditions imposed in Beasley's 1986 CP. Therefore, we believe that no material question of fact exists as to Beasley's compliance with Section 73.211(c), and we find that consequently the public interest would be best served by granting Beasley's application.

14. Accordingly, IT IS ORDERED, That the Applications for Review filed by Elyria ARE DENIED. In view of our action herein, IT IS FURTHER ORDERED, That Elyria's Petition to Stay the grant of the subject application and all other related pleadings ARE HEREBY DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] WDMT changed its call sign to WPHR, effective April 9, 1987. Subsequently, on November 6, 1987, the Mass Media Bureau granted an application to assign the license of WPHR to Ardman Broadcasting Corporation of Ohio (File No. BALH-870923HL). WBEA's call sign was changed to WCZR, effective January 1, 1989. For the sake of continuity and the purpose of this order, the parties and the call signs of the respective stations will be referred to as they existed at the time Beasley filed its original application.

[2] Elyria's Application for Review does not challenge the determination that WDMT's use of a directional antenna would not violate § 73.316(b). Therefore, this finding is not subject to review.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 4, 1989

Released: August 16, 1989

Great American Television
and Radio Co., Inc.
c/o Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Gentlemen:

This refers to the request of Great American Television and Radio Co., Inc. (Great American) for a permanent waiver of the Commission's one-to-a-market rule, 47 C.F.R. Section 73.3555(b), to permit Great American to retain its ownership interests in the following broadcast stations: WKRC-TV (Channel 12, ABC), WKRC(AM) and WKRQ(FM), Cincinnati, Ohio; WDAF-TV (Channel 4, NBC), WDAF(AM) and KYYS(FM), Kansas City, Missouri. Great American's request is unopposed.

Great American obtained its current interest in these stations through a transfer of control of Taft Broadcasting Company (Taft) in October 1987. Taft's common ownership of co-located television and radio stations in Cincinnati and Kansas City -- ordinarily an ownership pattern prohibited by the Commission's one-to-a-market restrictions -- was authorized pursuant to the grandfathering provisions of our multiple ownership rules. Because the grandfathered status of prohibited combinations does not survive a transfer of control, however, Great American was obliged to resolve the cross-ownership violations which its acquisition of Taft's Cincinnati and Kansas City stations would create. Accordingly, Great American sought grant of the Taft transfer applications conditioned on the outcome of a then-pending notice of proposed rule making that contemplated relaxing the one-to-a-market rule.[1] Great American contended that any divestiture of the co-located Taft stations should be deferred until the rule making determined with certainty whether such divestiture would be necessary under the revised rules. The Commission agreed and approved the transfer on condition that, within 18 months of consummation of the Taft transfer or 6 months after the effective date of Commission action in the rule making, whichever was later, the transferee would come into compliance with the multiple ownership rules as they then existed.[2]

On February 23, 1989, the Commission released its *Second Report and Order* in MM Docket No. 87-7 (*Second Report*), 4 FCC Rcd 1741, in which it retained the one-to-a-market rule, but adopted a relaxed waiver standard for cases satisfying certain criteria. Specifically, the Commission indicated that it would "look favorably upon waiver applications involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees or 'voices' after the proposed merger." *Id.* at 1741. The Commission also stated that it would look with similar favor on waiver requests involving "failed" broadcast stations. Beyond these two circumstances, the *Second Report* asserted that waiver applications would be considered on a case-by-case basis and evaluated using various public interest criteria, including: (1) the potential benefits of joint operation of the facilities; (2) the types of facilities involved (*e.g.*, VHF or UHF, AM or FM); (3) the number of media outlets already owned by the applicant in the relevant market; (4) any financial difficulties experienced by the stations involved; and (5) the nature of the market -- that is, the level of competition and diversity, based on both broadcast and other media voices, after the requested joint operation is implemented. These factors would be weighed to determine whether, in a given case, the public interest, efficiency and other potential benefits of combined facilities can be obtained without undermining the public interest in diversity and economic competition in communications markets.

Because the *Second Report* did not exclude Great American's ownership interests in Cincinnati and Kansas City from the scope of the one-to-a-market rule, the request now before us seeks a permanent waiver of that rule.[3] Moreover, because Cincinnati and Kansas City are ranked 29th and 28th, respectively, among Arbitron television markets, and no claim of a "failed station" is made, Great American must demonstrate its waiver request is in the public interest under the case-by-case criteria described above, as clarified by the Commission in its recent order on reconsideration in the one-to-a-market rule making proceeding. *Memorandum Opinion and Order* in MM Docket No. 87-7 (*Reconsideration Order*), FCC 89-256 (released August 4, 1989).[4]

In support of its waiver request, Great American first contends that permitting continued common ownership of its Cincinnati and Kansas City stations would be consistent with the principle of continuity of operation underlying the Commission's grandfathering policies. In this regard, Great American asserts that, to a substantial degree, these stations are subject to the same management and operating policies today as they were prior to their 1987 transfer from Taft. Great American identifies numerous key officers and directors of Taft who continue in their former or other critical positions with Great American. Great American also notes that its operations, like those of its predecessors, remain headquartered in Cincinnati. In sum, the applicant contends that, despite its 1987 transfer of control, Great American's long-term continuity of management and operation of the Cincinnati and Kansas City stations is at least as great or greater than that of most companies to which the grandfathering provisions of Section 73.3555 of the rules still apply. Grant of its waiver request, Great American argues, would preserve this long-standing continuity.

Great American also observes that grant of its waiver request would not reduce existing levels of diversity or competition in the Cincinnati or Kansas City markets because the stations involved have been commonly owned for periods ranging from 25 to 40 years. This, the applicant suggests, is quite unlike the typical waiver case described in the *Second Report*, in which the merger of existing, separately owned stations in a market would effect a net reduction in the number of independent voices in a market. In such circumstances, it is argued, a legitimate concern for the potential adverse effects on

diversity and competition from grant of a waiver would be raised. Here, however, no such reduction in the number of separately owned voices will occur. Rather, grant of the requested waiver will simply maintain the long-established status quo.

Most fundamentally, Great American argues that waiver is warranted because it has demonstrated that: (a) similar levels of diversity and competition prevail in Cincinnati and Kansas City as the Commission presumes prevail in the 25 largest markets under the "top 25 markets/30 voices" standard; and (b) comparable operating efficiencies are obtained from the joint operation of its stations in Cincinnati and Kansas City as the Commission presumes are obtained at jointly operated facilities in markets qualified for favorable consideration under the "top 25 markets/30 voices" test. In short, Great American contends that it is similarly situated to those licensees entitled to a presumptive waiver under the newly revised criteria announced in the *Second Report* and that it should be similarly treated. Great American has documented in considerable detail both the highly diverse and competitive nature of the Cincinnati and Kansas City markets and the substantial and specific efficiencies which it derives from combined operation of its radio and television stations in these two cities.

With respect to diversity and competition, Great American submits data based on both Arbitron rankings and Commission ownership files which indicate that the relevant Cincinnati television market -- including the existing common ownership of Great American's stations there -- currently has 35 separately owned, operated and controlled licensees or "voices" and a total of 43 (9 television and 34 radio) broadcast stations. Comparable data for Kansas City indicate that there are 33 separate voices and a total of 42 (9 television and 33 radio) stations. Thus, in both relevant markets, the level of voice diversity plainly exceeds the 30 voice threshold used by the Commission in identifying markets in which it would presume adequate diversity and competition to warrant granting one-to-a-market waivers. Further, Great American contends that diversity and competition among television licensees in its markets may well be more intense than in many of the top 25 markets because there are more television homes per station in most top markets than in either Cincinnati or Kansas City. Similarly, Great American states that 19 of the radio metro markets in the top 25 television Areas of Dominant Influence (ADI's) include a greater number of adult listeners per radio station than do either Cincinnati or Kansas City. Diversity is enhanced where there are fewer viewers or listeners per station, Great American argues, because .

> there is *greater* chance that a news event of interest to a particular local resident will be covered, a *greater* chance that a local organization will be able to have its public service announcement aired, and a *greater* chance
>
> that a radio listener will have an opportunity to participate in a listener call-in show.

Petition for Waiver at p. 21 (emphasis in original). Economic competition among stations in smaller markets like Cincinnati and Kansas City will be more intense than in many of the top 25 markets, the applicant contends, because relatively the same number of stations are competing for fewer advertising dollars.

Great American submits extensive data on the growth of media outlets in the Cincinnati and Kansas City markets since establishment of the one-to-a-market rule in 1970 and asserts that this growth has been at least as great as in the top 25 markets over the same period. The data establish, Great American argues, that both the Cincinnati and Kansas City markets are now served by an abundance of competing media and that waiver of the one-to-a-market rule in its case would not undermine the Commission's basic interest in preserving diversity and economic competition. Specifically, the applicant notes that television broadcast service in Cincinnati and Kansas City has grown from 3 network-affiliated commercial stations in 1970 to 5 commercial and 4 noncommercial stations in Cincinnati and 7 commercial and 2 noncommercial stations in Kansas City. Since 1970, 7 AM or FM stations have begun operations in the Cincinnati market and 5 stations have commenced broadcasting in Kansas City. Cable penetration has grown from 1% in Cincinnati and 3% in Kansas City in 1970 to approximately 50% in each market today, a rate which exceeds that in 13 of the top 25 markets. The average number of channels available to cable subscribers in 1987 was 50.1 in Cincinnati and 38.7 in Kansas City. Consumer video cassette recorders (VCRs), which did not exist as an information source in 1970, are now present in 58% of the homes in Cincinnati and 60% of the homes in Kansas City. Both Cincinnati and Kansas City are also served by substantial print media. Each market, for example, supports a dominant, independently owned daily newspaper and Cincinnati receives service from 8 other daily and 72 weekly papers, while Kansas City is served by 20 other daily and 75 weekly papers.

Great American also contends that it realizes substantial economic efficiencies from the joint operation of its stations in both Cincinnati and Kansas City and that these efficiencies assist it in providing superior broadcast service to its communities of license. The applicant documents these savings in great detail and quantifies, wherever possible, the financial benefits derived from joint operation. Specifically, Great American asserts that the major cost savings attributable to its combined station operations in Cincinnati and Kansas City are as follows (the amounts indicated in parentheses generally reflect the estimated annual cost to a separate owner to obtain similar services independently):

(1) Common FM and TV tower and transmitter building in each market ($30,000 to $40,000).

(2) Shared AM-FM/TV studios and offices in Cincinnati ($65,000 to $79,000).

(3) Common land use by AM-FM and TV stations for studio and office buildings in Kansas City; shared parking facilities ($103,000).

(4) Shared AM-FM/TV business departments and business managers in each market ($100,000).

(5) Shared (all stations) "home office" administrative and management services and expertise including budgeting, personnel matters, regulatory affairs, union relations, insurance, professional services, and general management ($250,000).

(6) Miscellaneous joint efficiencies, primarily personnel related: (a) shared building and grounds security ($25,000); (b) shared building cleaning and maintenance ($5,000); (c) common accounting and legal services ($15,000 to $20,000); (d) common AM-FM/TV switchboard operator in Cincinnati ($12,000); (e) inter-station use of engineering staffs as backups for each other ($20,000).

Great American also recites numerous efficiencies it obtains through joint operation of its stations which are significant, but more difficult to quantify, including those which would represent one-time costs to a separate owner. In some instances, the benefits described might be simply unobtainable by a separate owner. For example, in each market, the radio and television news staffs, while separate, share news "leads" and the radio stations are able to use the audio portion of TV source material ("actualities") in their newscasts. Both the Cincinnati and the Kansas City radio and television combinations engage in substantial cross-promotion. In each market, the radio stations share the use of certain "air" personalities with the commonly owned TV station, including an airborne traffic reporter, a local sports personality, a weather reporter and a "troubleshooter" reporter. In both markets, the TV stations have access to the sound effects libraries of the commonly owned radio stations ($20,000 one-time expense for a separate owner). Finally, in each market, the TV stations produce some of the television spots for the commonly owned radio stations ($5,000 in Kansas City and $10,000 in Cincinnati).

Great American asserts that these substantial joint efficiencies produce significant public service benefits in both Cincinnati and Kansas City. For example, the applicant argues that "[w]ithout the assured stability and operating efficiencies provided by Great American's TV and FM operations in each market, neither AM station would be operated at its current high staffing and expense levels." Great American notes, in this connection, that its AM station in Cincinnati employs nine full-time and two part-time news staff members and incurs more than $4,800,000 in operating expenses annually. In Kansas City, Great American's AM station employs five full-time and two part-time newspersons and operates at an annual cost of more than $3,200,000. In the applicant's view, a separate radio owner would be unable to sustain these levels of expense and would be required to effect substantial cost reductions. These reductions would probably come at the expense of the existing news staffs of each station and the news and public affairs programming they now produce. They would, as well, most likely involve a shift of each station's primary programming reliance to a satellite-delivered service, thus ending the full-service role these AM facilities have heretofore played in their communities.

The applicant also states that the combined operation of its stations in Cincinnati and Kansas City permits it to conduct joint promotional activities in support of numerous civic and charitable causes. Further, Great American indicates that the combined operating efficiencies of its stations have allowed it to commit its AM station in each city to the broadcast of a noncommercial, 25-minute community affairs program on a weekly basis.

Utilizing the case-by-case criteria fashioned in the *Second Report*, and discussed above, we have carefully reviewed Great American's request for waiver and the detailed showings it has submitted in support of that request. We have focused our analysis on those factors of particular relevance in light of the size and circumstances of the markets involved. Before discussing these primary considerations, however, we note Great American's unequivocal assertion that, beyond its broadcast interests, it owns no other media interests in the relevant markets. Additionally, there is no claim by the applicant that the stations involved in this proceeding are facing financial difficulties. Given the totality of the circumstances in this case, we conclude that these two criteria -- other media interests and financial distress -- pose no impediment to Great American's request.[5]

We turn now to the remaining waiver criteria. Based on these factors, we conclude that Great American has fully justified a permanent waiver of the one-to-a-market rule to permit its continued common ownership of the AM-FM-TV combinations it now operates in Cincinnati and Kansas City.

First, as we noted in considerable detail above, Great American has extensively documented the substantial economic efficiencies derived from its ongoing joint operation of AM, FM and TV stations in both Cincinnati and Kansas City. Because the facilities here in question have been in operation under common ownership for many years, the information available as to the magnitude of the efficiencies associated with joint operation is particularly specific and persuasive. Great American has, moreover, related the cost savings it realizes from these efficiencies to explicit service advantages in the operation of its stations. This is precisely the type of public interest benefit from common station ownership which we envisioned as warranting a waiver of the one-to-a-market rule and to which we have looked in various actions relaxing our multiple ownership rules in other contexts. *See, e.g., Second Report, supra* at 1746-50; *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723, 1727-28 (1989) (relaxation of the radio duopoly rule); *Report and Order* in MM Docket No. 84-19, 101 FCC2d 402, 415 (1984) (elimination of the regional concentration of control rule), *recon. denied*, 101 FCC2d 1544 (1985).

With respect to the types of facilities at issue in the subject waiver request, there is no question that substantial stations are involved. In Cincinnati, Great American's television station is a VHF network affiliate operating with 316-kW visual power at 305 meters height above average terrain (HAAT). Its FM facility in Cincinnati operates on 101.9 MHz with 16-kW output power at an antenna height of 267 meters, while its AM station operates on 550 kHz with 5-kW daytime and 1-kW nighttime power. In Kansas City, Great American's television station is also a VHF network affiliate. It operates with 100-kW visual power at 344 meters HAAT. Its FM station broadcasts on 102.1 MHz with 100-kW output power at an antenna height of 305 meters, while its AM station operates on 610 kHz with 5-kW power. Our concern with the types of facilities merging under the authority of a one-to-a-market waiver reflects our interest in assessing the potential impact of a proposed combination of stations in a given market in order that we might predict and

avoid any significant adverse effect on diversity or competition from too powerful a combination. As the level of diversity and competition in a market increases, however, our concern with this aspect of a proposed combination diminishes. In markets with substantial numbers of competing stations, even a merger of large stations will not likely have a perceptible negative impact on diversity or competition. In the case before us, we believe Great American has demonstrated levels of diversity and competition in both Cincinnati and Kansas City which allay any concern we might have over the continued common ownership of the facilities it now controls, notwithstanding their substantial character.

Finally, as to the nature of the relevant markets, Great American has clearly demonstrated a robust level of voice diversity and economic competition among media outlets in both Cincinnati and Kansas City. Great American has documented fully 35 separately owned broadcast voices in Cincinnati and 33 such voices in Kansas City; further, among these voices, each market numbers 9 full-time, separately owned televison stations. In each market, then, the number of separately owned radio and television stations comfortably exceeds the 30 voice threshold component of the "top 25 markets/30 voice" standard the Commission uses in identifying markets presumptively entitled to a waiver of the rule. Additionally, Great American has demonstrated an abundance of cable, print and alternative media information sources in each market. According to the applicant, "the average citizen in both Kansas City and Cincinnati today clearly has immediate access to literally dozens of media voices." Moreover, nothing in the record suggests that the structure of the Cincinnati or Kansas City markets is so volatile or subject to such imminent change that these levels of competition and diversity will likely decrease in the forseeable future.[6]

In evaluating requests for waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market area involved." *Reconsideration Order*, *supra* at para. 18. In the top-25 television markets, where 30 or more independent broadcast voices will remain, we have stated our inclination to accept an applicant's contention that vigorous diversity and competition will persist despite the merger of previously separately owned facilities. In other circumstances, where no claim of a "failed station" is made, we have indicated that applicants must specifically demonstrate the public interest benefits of common ownership of stations ordinarily required to be separately owned by the one-to-a-market rule. We have also noted, however, that "[c]onsistent with the Court's instructions in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), we will endeavor to treat all waiver petitions, both within and outside the top 25 largest markets, that are shown to be factually comparable in a comparable manner." *Id.* In the case before us, we believe Great American has, through its extensive showings, clearly established the comparability of its markets, in all relevant respects, to top 25 markets for purposes of waiver of the one-to-a-market rule and shown that a waiver is in the public interest under our case-by-case criteria.

Accordingly, the Petition for Waiver filed by Great American Television and Radio Company, Inc., for a permanent waiver of Section 73.3555(b) of the Commission's Rules to permit the petitioner's continued common ownership of stations WKRC-TV, WKRC(AM) and WKRQ(FM), Cincinnati, Ohio, and stations WDAF-TV, WDAF(AM) and KYYS(FM), Kansas City, Missouri, is granted.

BY DIRECTION OF THE COMMISSION *

Donna R. Searcy
Secretary

* Commissioner Dennis dissenting and issuing a statement at a later date.

FOOTNOTES

[1] *Notice of Proposed Rule Making* in MM Docket No. 87-7, 2 FCC Rcd 1138 (1987).

[2] For the sake of clarity, we have referred to the applicant-transferee in this earlier proceeding as Great American. While this accurately reflects the substance of the transaction, the initial applicant-transferee was actually TFBA, Ltd. Partnership. *See Taft Broadcasting Co.*, 2 FCC Rcd 6622 (MMB 1987).

[3] Great American also requests that, in the event its waiver application is denied, it be afforded a minimum of six months from the later of the effective date of the Commission's action denying the waiver or the conclusion of review proceedings in the one-to-a-market rule making proceeding within which to file applications effecting the necessary divestitures of its stations. In view of our action in this proceeding, this request is moot and is hereby dismissed as such.

[4] In its *Reconsideration Order*, the Commission denied Great American's petition for partial reconsideration of the *Second Report*. Great American's petition, filed shortly after the subject waiver request, had sought to delete the "top 25 markets" component of the "top 25 markets/30 voices" waiver standard announced in the *Second Report*. A similar argument is raised in the current waiver proceeding. Because this contention has now been disposed of, it will not be reviewed here. Rather, we will consider Great American's arguments only insofar as they are relevant under the governing waiver standard.

[5] As we indicated in the *Reconsideration Order*, in evaluating waiver requests under the case-by-case criteria, "not all of the factors mentioned will be relevant in every case." *Reconsideration Order* at para. 18.

[6] Indeed, since the pleadings were filed in this proceeding, Kansas City has risen in television market rank from 30th to 28th. Cincinnati continues to be ranked 29th.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GE AMERICAN COMMUNICATIONS, INC. File No. I-T-C-88-119

Application for Authority to Provide to the United States Customs Service Voice and Data Services via Satellite between Miami, Florida and Gun Cay, Bahamas

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 7, 1989 **Released: August 16, 1989**

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned application filed by GE American Communications, Inc. (GE Americom) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to use its domestic satellite system to provide to the United States Customs Service two duplex voice grade circuits, and one duplex 14.4 kilobit per second (kbps) data circuit between the Customs Service facility at Miami, Florida and the Customs Service Base at Gun Cay, Bahamas. The application was placed on the Commission's public notice and no comments were received.

2. GE Americom states that the requested facilities and services will form an integral part of a satellite communications network linking various Customs Service installations in the war on drugs.[1] Specifically, the Customs Service will use its satellite communications network to monitor through radar installations the Gulf of Mexico area for possible drug smuggling operations. Since the Gun Cay-Miami communications link will be a necessary part of this network, GE Americom states that the services requested in its application will provide communications vital to the security of the United States.

3. According to GE Americom, there are currently no communications requirements at Gun Cay, other than that of the Customs Service. Therefore, GE Americom notes that the cost of INTELSAT facilities would have to be borne by that one site, which would result in higher costs than if the Gun Cay location were incorporated into the Customs Service's overall network linked via domestic satellite capacity. Moreover, GE Americom maintains that if INTELSAT facilities were used, there would also have to be duplicate ground facilities constructed at each network point which communicates with Gun Cay. GE Americom avers that these facilities would be unnecessary if the Gun Cay installation were included in the overall Customs Service network. In addition, because the facilities will provide communications vital to the security of the United States, GE Americom states that use of its domestic satellite system is consistent with the INTELSAT Agreement. In this regard, GE Americom notes that Article XIV(g) of the INTELSAT Agreement provides that the Agreement does not apply to the establishment, acquisition or utilization of space segment facilities separate from the INTELSAT space segment facilities solely for national security purposes. GE Americom cites a March 19, 1988 letter from the Customs Service which supports its conclusion.

4. In light of these circumstances, we conclude that a grant of GE Americom's application will serve the public interest. In 1981, the Commission formulated its Transborder policy which permits the use of domestic satellites for the provision of international public telecommunications services where INTELSAT cannot provide the proposed service or where it would be clearly uneconomical or impractical to use INTELSAT facilities for the service.[2] The circumstances involved in the instant application clearly satisfy the second of these criteria. The Customs Service is establishing a communications network over domestic satellite facilities which involves, for the most part, domestic locations. The inclusion of Gun Cay, Bahamas as part of this network is clearly more economical and practical than using INTELSAT facilities for service to this one point. The Commission has found on several occasions that where the extension of domestic networks is involved, use of INTELSAT facilities would be clearly uneconomical and impractical.[3] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. In such circumstances, the Commission has concluded that use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add a transborder location to its network resulting in an inefficient use of the available radio spectrum.

5. We also find that use of the GE Americom's domestic satellite system to provide the proposed services is consistent with the INTELSAT Agreement. As GE Americom notes, Article XIV(g) of the INTELSAT Agreement provides that the Agreement does not apply to the use of non-INTELSAT space segment facilities solely for national security purposes. By letter dated July 21, 1989, the Department of State notified the Customs Service that it concurred in the determination that the use of the facilities at issue here would be solely for national security purposes.[4]

6. In light of the above, IT IS HEREBY CERTIFIED that the public interest requires the use of GE Americom's domestic satellite system for the provision of two-way communications between Miami, Florida and Gun Cay, Bahamas.

7. Accordingly, IT IS ORDERED, that the application of GE Americom, File No. I-T-C-88-119, IS GRANTED and GE Americom is authorized to use its domestic satellite system to provide two duplex voice grade circuits and one duplex 14.4 kbps data circuit between the Customs Service facility at Miami, Florida and the Customs Service Base at Gun Cay, Bahamas.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] GE Americom notes that the network points will encompass among others, installations in New Orleans, Houston, Cudjoe Key, Florida and Cape Canaveral. With the inclusion of Gun Cay, GE Americom anticipates that the network will be expanded to include other Customs Service installations.

[2] Transborder Satellite Video Services, 88 FCC 2d 258 (1981); Satellite Business Systems, 88 FCC 2d 195 (1981); and American Satellite Company, 88 FCC 2d 178 (1981).

[3] Satellite Business Systems, 88 FCC 2d at 207.

[4] Letter dated July 21, 1989 from Randolph C. Earnest, Director, Office of Satellite and Cable Policy, Department of State to Gary F. Grimm, United States Customs Service.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-353

In Re Applications of

Jerry L. Roth d/b/a RICHMOND HILL BROADCASTING (hereafter "RHB")	File No. BPH-870819MG
G. Troy Mattox d/b/a BRYAN COUNTY BROADCASTING (hereafter "County")	File No. BPH-870819MI
ZEPHYR COMMUNICATIONS CORP. (hereafter "Zephyr")	File No. BPH-870819MK
GEORGIA BROADCAST PARTNERSHIP (hereafter "Georgia")	File No. BPH-870819MQ
MGT LIMITED (hereafter "MGT")	File No. BPH-870819MV
ANDERSON BROADCASTING CO., INC. (hereafter "Anderson")	File No. BPH-870819MC (PREVIOUSLY DISMISSED)
SALUKI BROADCASTING CORPORATION (hereafter "Saluki")	File NO. BPH-870819MM (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
on Channel 286A (105.1 MHz)
in Richmond Hill, Georgia

HEARING DESIGNATION ORDER

Adopted: July 25, 1989; Released: August 16, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On August 15 and 16, 1988, respectively, the FM Branch returned Anderson's and Saluki's applications as unacceptable for filing. Engineering reviews of both applications revealed that the coordinates plotted on the applicants' original U.S.G.S. topographic maps did not match those listed in their respective responses to Section V-B, Item 2(b) of FCC Form 301.[1] As the Branch's letters noted, these inconsistencies made it "impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval."

3. Anderson and Saluki have petitioned for reconsideration of these actions. Both concede that the locations plotted on their tendered site maps do not match the coordinates specified in Section V-B, Item 2(b) of their respective applications. In its petition, Anderson explains that "the application was prepared at the right coordinates" but that its consulting engineer "failed to move the 'X Target' which shows the proposed site." Saluki attributes its error to "a typographical error, that, once committed, was carried over throughout the application." Both argue, however, that their errors do not warrant return of their applications. Anderson alleges that since the difference between the plotted and the specified sites "is only 1823 feet and the same person owns the entire tract of land we feel that all engineering and legal questions for both the FCC and FAA were engineered from the correct coordinates." Saluki claims that "the labeling of the site coordinates, rather than the identification of the site itself, was the error, and that the location of of the transmitter at the site shown on the map can be confidently and reliably determined from other information contained in the application." Specifically, Saluki notes the coordinates specified in at least four parts of the application could not meet the description of the site in Section V-B, Item 2(a), and that this description is consistent with that in Exhibit E-4 and the first two pages of its Engineering Statement.

4. We do not agree with these conclusions. Applicants for AM, FM and TV station construction permits have long been required, in pertinent part, by FCC Forms 301 and 340, to show on a 7.5 minute series U.S. Geological Survey Topographic Quadrangle map "the proposed transmitter location *accurately* plotted." *FM Transmitter Site Map Submissions Required by FCC Forms 301 and 340*, 1 FCC Rcd 381 (1986).[2] As emphasized in the *FCC 301 Instructions*, at page 5, the purpose for such a map is "to allow the Commission's processing staff to verify the correctness of the geographic coordinates provided in an FM Application." The failure, therefore, to provide a consistent set of coordinates prohibits the Commission's staff from determining the acceptability of applications. *La Crescent Community Broadcasters*, 3 FCC Rcd 2332 (1988). The Anderson and Saluki pleadings are apparently premised on the belief that the Commission's staff matches the specified coordinates to the applicant's physical description of the site. Since each one second of latitude on a topographic map equals 60 feet, a general physical description like Saluki"s 'At the end of Magnolia Street off of GA Hwy 144" would produce an approximate but not an exact set of coordinates. For this reason, the staff verifies the applicant's coordinates utilizing the marked site and the U.S.G.S. scale of distance and coordinate axes markings. Given the petitioners' acknowledgement that their respective sites are incorrectly plotted, no information is available within the applications or in any Commission record that would enable the staff to identify precisely the transmitting antenna tower coordinates. *See*

Steven B. Courts, FCC 89-175 (released June 9, 1989); *Benjamin Macwan*, FCC 89-176 (released June 9, 1989); *R.A.D. Broadcasting Corporation*, FCC 89-178 (released June 9, 1989). Accordingly, Anderson and Saluki's petitions will be denied.

5. *RHB*. Jerry L. Roth, sole owner of RHB, is President, General Manager and 25% owner of Stations WSGA(AM)/WZAT-FM in Savannah, Georgia. The 3.16 mV/m contours of the proposed station and WZAT-FM would clearly overlap, in contravention of 47 C.F.R. § 73.3555. Mr. Roth has indicated his intent to terminate his relationship with these stations in the event of grant of the referenced application. Accordingly, in the event of grant of RHB's application, Mr. Roth will be required to divest himself of all interest in and sever all connections with WSGA(AM) and WZAT-FM prior to the commencement of program test authority.

6. *Georgia*. Information before the Commission indicates that Georgia was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solana, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Georgia's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

7. Item 5(e) of Section II, FCC Form 301 (October 1986) requires, in pertinent part, applicants to indicate if the applicant or any party to it has an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the applicant." If this item is answered affirmatively, the applicant must provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. The Commission's records reveal that Georgia neglected to indicate that Terry Trump holds a 3.3% interest in Biltmore Forest, North Carolina applicant Biltmore Broadcasting, Inc. ("BBI") (File No. BPH-870831MM), and that a post-designation character issue was specified against BBI in that proceeding. *National Communications Industries*, (MM Docket No. 88-577, FCC 89M-1028, released March 31, 1989). Since Georgia failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issue, an appropriate issue will be specified below.

8. *MGT*. In response to Section III of FCC Form 301, MGT indicated that it was "in the process of obtaining a financial commitment" that would make funds available to construct and operate the requested facilities for three months without revenue." Since no evidence has been produced indicating that the applicant has obtained the necessary funding, a financial issue will be specified.

9. *Other matters*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. County and Georgia have not completed Item 4 correctly. Both have provided post office box numbers as the residence address for parties to their applications: County for its sole proprietor, G. Troy Mattox; Georgia for five of its general partners.[3] Accordingly, both will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

10. RHB (on October 9, 1987, August 15 and September 9, 1988), County (on May 9, 1989), Zephyr (on October 15, 1987 and July 15, 1988) and Georgia (on November 8, 1988 and May 5, 1989) petitioned for leave to amend their respective applications. The accompanying amendments were filed after October 8, 1987, the last date for filing minor amendments as of right. RHB's amendment filed October 9, 1987 proposed a new transmitter site approximately 2.1 kilometers SSE of the intersection of Routes 17 and 144 in Richmond Hill. In its accompanying petition for leave to file, RHB indicates that the amendment was late filed because its messenger arrived at the Secretary's office shortly after the 5:30 P.M. deadline on October 5, 1987. While acknowledging this fact, RHB argues that "the late-filing of the amendment is the result of unforeseen circumstances, namely, a heretofore reliable messenger service's inability to meet the Commission's filing deadline." The Commission, however, "no longer considers as unusual or compelling . . . requests for waiver based on claims that copying machines, *delivery services* or even, in most cases, inclement weather or illness, was responsible for the tardy filing" (emphasis added). *FCC Overrules Caldwell Television Associates Ltd.*, FCC 85-534 (October 4, 1985). Accordingly, RHB's October 9, 1987 site change amendment and its August 15, 1988 amendment providing evidence of Federal Aviation Administration approval of the new site will be returned. Under Section 1.65 of the Commission's Rules, RHB's September 9, 1988 amendment updating the media interests of its sole owner and County, Zephyr and Georgia's above-noted amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

11. The Commission has recently changed the channel allocated to Richmond Hill from 286A to 287A. *Memorandum Opinion and Order* in MM Docket 86-294, 4 FCC Rcd 1608 (1989). Accordingly, the applicants in this pro-

ceeding will be required to submit the appropriate engineering data to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Georgia.

2. To determine whether Georgia's organizational structure is a sham.

3. To determine whether Georgia violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report: the designation of character issues against other applications in which one or more of its partners has an ownership interest.

4. To determine, from the evidence adduced pursuant to issues 1 through 3, whether Georgia possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine with respect to MGT whether the applicant is financially qualified.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by Anderson and Saluki ARE DENIED.

16. IT IS FURTHER ORDERED, That, in the event of grant of RHB's application, Jerry L. Roth will be ordered to divest himself of all interests in and sever all connections with Stations WSGA(AM) and WZAT-FM (Savannah, Georgia) prior to the commencement of program test authority.

17. IT IS FURTHER ORDERED, That County and Georgia shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RHB on October 9, 1987 and August 15, 1988 ARE DENIED and the corresponding amendments ARE RETURNED, but that the petitions for leave to amend filed by RHB on September 9, 1988, County on May 9, 1989, Zephyr on October 15, 1987 and July 15, 1988 and Georgia on November 8, 1988 and May 5, 1989 ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated above.

19. IT IS FURTHER ORDERED, That the applicants file with the presiding Administrative Law Judge, within 30 days of the release of this Order, the appropriate engineering data, discussed in Paragraph 11 hereinabove.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Anderson listed its coordinates as 31 degrees-55 minutes-44 seconds North Latitude, 81 degrees-20 minutes-00 seconds West Longitude. An engineering review of Anderson's site map reveals, however, the site plotted at 31 degrees-55 minutes-26 seconds, 81 degrees-20 minutes-00 seconds, a discrepancy of 18 seconds in latitude. Saluki listed its coordinates as 31 degrees-56 minutes-11 seconds North Latitude, 81 degrees-18 minutes-28 seconds West Longitude. Our engineering review of its site map reveals the site plotted at 31 degrees- 55 minutes- 55 seconds, 81 degrees-18 minutes-28 seconds, an error of 16 seconds in latitude.

[2] Section V-B, Item 2 of FCC Form 301 (October 1986) requires applicants to provide the "*exact* location" of their proposed antenna. Similarly, Section V-B, Items 15 and 16 requires

applicants to provide maps that show "clearly, legibly, and *accurately* " the location of the proposed transmitting antenna. (emphasis added).

[3] The principals are Danny W. Bacot, Christopher A. Kuettner, Sidney Stinson, E.M. Netto (100% owner of Netto Construction Pension & Trust) and Jorgen Warrer.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-337

In re Applications of

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION (hereafter "GPTC")	File No. BPED-870727MA
LOWELL MAZE JACKSON (hereafter "Jackson")	File No. BPH-870727MD
IVAN M. MILES (hereafter "Miles")	File No. BPH-870727ME
JOHNSON BROADCASTING, INC. (hereafter "JBI")	File No. BPH-870727MF
GEORGE S. FLINN, JR. (hereafter "Flinn")	File No. BPH-870727MI
PAUL UHRY MAZO d/b/a MAZO RADIO CO. (hereafter " Mazo")	File No. BPH-870727MJ
ROBERT W. ROUNSAVILLE (hereafter "Rounsaville")	File No. BPH-870727MK
SOUTHERN RADIO SERVICES, INC. (hereafter "SRSI")	File No. BPH-870727ML
ROSWELL BROADCAST COMMUNICATIONS, LTD. (hereafter "Roswell")	File No. BPH-870727MM
NEW GEORGIA BROADCASTING, LTD. (hereafter "NGBL")	File No. BPH-870727MO
EATHEL HOLLEY (hereafter "Holley")	File No. BPH-870727MQ

For Construction Permit
for a New FM Station on
Channel 298A (107.5 MHz)
in Roswell, Georgia

HEARING DESIGNATION ORDER

Adopted: July 25, 1989; Released: August 16, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The *Report and Order* in MM Docket 87-376, 3 FCC Rcd 4827 (1988), amends the FM Table of Allotments, 47 C.F.R. § 73.202(b), by allotting Channel 283A to Dalton, Georgia and substituting Channel 296C2 for Channel 296A (WZOT(FM)) at Rockmont, Georgia. The substitution of Channel 296C2 at Rockmont would be short-spaced by approximately 2 kilometers to the instant proposals of GPTC and Roswell. The *Order* requires GPTC and Roswell to amend to sites which do not conflict with the allotment. In accordance with Commission policy, the applicants will retain filing protection for their pending applications in the instant proceeding. On October 12, 1988, GPTC filed the required amendment changing its site. To date, Roswell has not filed such an amendment. Accordingly, Roswell will be required to file an amendment in compliance with the *Report and Order* in MM Docket 87-376 within 30 days of the release of this Order.

3. On January 26, 1989, Mazo filed a petition for leave to amend its application pursuant to 47 C.F.R. § 1.65. The accompanying amendment proposes to change the applicant from an individual, "Paul U. Mazo," to a two-tiered corporation, "Mazo Radio Co." On February 6, 1989, Miles filed an opposition to Mazo's petition and to the accompanying amendment. Miles alleges that the petition should be denied because Miles failed to make a showing of good cause for the acceptance of the amendment.

4. Because the 30-day period for filing amendments as of right in this proceeding began on September 8, 1987 and ended October 9, 1987, Mazo's January 26, 1989 amendment is untimely. Additionally, no good cause was shown by Mazo for acceptance of the amendment, which changes the legal form of the applicant from an individual applicant to a corporation and adds a new party to the applicant, Charles E. Taylor, non-voting shareholder who will be insulated from any ability to control the applicant. Paul U. Mazo, the original applicant, will hold 100% of the voting stock in the new company and will retain complete control of the applicant. As a result, the amendment makes no change in the actual control of the applicant. Therefore, while the amendment is untimely and no good cause was shown for its acceptance, we will accept the amendment pursuant to paragraph 10, below. Accordingly, the opposition filed by Miles will be denied.

5. *JBI.* Information before the Commission indicates that JBI was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:,

City/State	Docket No.,
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant; whether or not the applicant's organizational structure is a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant dismissed its application rather than resolving these issues. These unresolved issues call into question JBI's qualification to be a Commission licensee. Therefore, such issues will be specified against JBI in this proceeding.

6. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the application." If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. JBI has responded to Item 5(e) in the negative. In addition, JBI has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the outstanding character issues. Accordingly, an appropriate issue will be specified below.

7. Section II, Item 4, Form 301 (October 1986) requires that an applicant list the applicant and, if other than a natural person, its officers, directors, stockholders and partners with attributable interests. Mazo's application, as amended on January 26, 1989, did not list the new applicant, its residence address, and the other required information pertaining to the applicant. Accordingly, Mazo will be required to file an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. The Georgia Office of Fair Employment Practices (GOFEP) has under consideration two complaints against GPTC alleging that the applicant has unlawfully discriminated against Bertha M. Leffall (File No. 87-02-11) and Florene J. Bigham (File No. 88-01-16). Accordingly, GPTC will be required to inform the presiding Administrative Law Judge of any decision reached by the GOFEP regarding these two complaints as soon as it is available.

9. Review of the Jackson proposal reveals that a discrepancy exists in the values given for the height of the antenna radiation center above mean sea level (AMSL). Item 7(b) of Section V-G, Form 301, lists this value as 414 meters while the tower sketch shows 412 meters for this parameter. Upon analysis, we find that the discrepancy can be confidently and reliably resolved on the basis of the information within the application. We note that the antenna radiation center AMSL is equal to the site elevation plus the height of the antenna radiation center above ground level. Therefore, the height of the antenna radiation center AMSL is equivalent to 317 meters (from Item 7, Section V-G, the tower sketch, and the site map) plus 95 meters (Item 7, Section V-B and the tower sketch) = 412 meters (AMSL). Consequently, although the 414 meter value was determined clearly to be in error, this discrepancy did not affect the tenderability or acceptability of the application, which was properly accepted for tender and for filing. However, Jackson will be required to submit to the presiding Administrative Law Judge, within 30 days of the release of this Order, a corrective amendment to specify a value of 412 meters for the height of the antenna radiation center AMSL.

10. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting form the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
GPTC	February 8, 1988; August 25, 1988 October 12, 1988 (Engineering); January 31, 1989; May 9, 1989
Mazo	January 26, 1989[1]
SRSI	July 27, 1988; August 10, 1988; February 10, 1989; May 16, 1989; July 11, 1989

11. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of JBI.

2. To determine whether JBI's organizational structure is a sham.

3. To determine whether JBI violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether JBI possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the February 6, 1989 "opposition to petition for leave to amend" filed by Miles against Mazo's January 26, 1989 amendment IS DENIED, and GPTC's "comments" on the petition for leave to amend filed by Mazo IS DISMISSED AS MOOT.

15. IT IS FURTHER ORDERED, That Roswell shall submit an amendment in accordance with paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That Mazo shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That GPTC shall file the information as set forth in paragraph 8 hereinabove with the presiding Administrative Law Judge as soon as it is made available by the Georgia Office of Fair Employment Practices.

18. IT IS FURTHER ORDERED, That Jackson shall submit an amendment in accordance with paragraph 9 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by GPTC, Mazo, and SRSI ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We note that on February 6, 1989 GPTC filed "comments" on the petition for leave to amend filed on January 26, 1989 by Mazo. GPTC requested that Mazo's amendment be accepted by the Commission solely for purposes of compliance with 47 C.F.R. § 1.65 and that no comparative advantage accrue to Mazo as a result of this amendment. As stated above in paragraph 10, Mazo will not receive any comparative advantage from its January 26, 1989 amendment. Accordingly, GPTC's comments will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RONALD F. TRINCHITELLA — File No. 85554-CL-P-299-A-86

For a construction permit to establish a cellular system operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service for the Casper, Wyoming MSA

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 16, 1989

By the Commission:

1. Ronald F. Trinchitella's (Trinchitella's) application was selected first in the lottery for the Casper, Wyoming Metropolitan Statistical Area (MSA). The Mobile Services Division (MSD) returned the application as unacceptable for filing because the application had been signed by Robert Napp,[1] pursuant to a power of attorney, rather than by Trinchitella.[2] The MSD said that the application was not personally signed by the applicant as required by Section 1.743(a) of the Commission's rules, and did not include the showing required for the exceptions contained in Section 1.743(b) of the rules. The Common Carrier Bureau (Bureau) affirmed the MSD's decision.[3] Trinchitella then filed an application for Commission review. United States Cellular Corporation (USCC), the second ranked applicant in the lottery, filed an opposition to the application for review. Trinchitella filed a reply.[4]

The Signature Rule

2. At the time Trinchitella filed his application, Section 1.743 read, in pertinent part, as follows:[5]

> (a) Except as provided in paragraph (b) of this section, applications . . . shall be *personally* signed by the applicant, if the applicant is an individual... by an officer or duly authorized employee, if the applicant is a corporation . . .
>
> (b) Applications . . . may be signed by the applicant's attorney in case of the applicant's physical disability, or in case the applicant does not reside in any of the contiguous 48 states of the United States or in the District of Columbia. The attorney shall in that event separately set forth the reason why the application is not signed by the applicant (emphasis added).

Section 1.743(a)

3. Trinchitella makes four arguments in support of his position that an attorney in fact's signature meets the requirements of Section 1.743(a). First, Trinchitella states that he is a citizen of California, and that the California Civil Code authorizes attorneys in fact to sign all papers required by any government agency. Second, Trinchitella notes that Section 1.743(a) does not contain any express prohibitions or restrictions on signatures by an attorney in fact. Third, Trinchitella argues that it is inconsistent to allow authorized employees to sign on behalf of a corporation, but not to allow authorized attorneys in fact to sign on behalf of an individual.[6] Finally, Trinchitella cites *Miscellaneous Amendments to Chapter*, FCC-62-962, 27 Fed. Reg. 9476 (September 20, 1962) (*Amendments*), and argues that the Bureau's interpretation of Section 1.743 is contrary to the congressional intent of reducing filing burdens on the applicant.

4. The Commission has previously held that a signature made pursuant to a power of attorney does not meet the personal signature requirement of Section 1.743(a). *Bruce M. Schorsten*, 3 FCC Rcd 4409 (1988); *see also Clyde W. Pierce*, 2 FCC Rcd 3522 (Com. Car. Bur. 1987). In response to the specific arguments made by Trinchitella, we note first that the Commission, as an agency of the federal government, is not bound by the provision in the California Civil Code.[7] Second, the rules at that time clearly stated that the only two exceptions to the requirement that the application must be *personally* signed by the applicant if the applicant is an individual were if the applicant is disabled or does not reside in 48 contiguous states.[8] Given the unambiguous nature of the signature requirement, it is clear that the Commission did not intend to permit signatures by attorneys in fact, or any other party, absent compliance with Section 1.743(b). *See Bruce M. Schorsten*, 3 FCC Rcd at 4409. The fact that there is no express prohibition or reservation to that effect is irrelevant. Third, the signature rules for individuals and corporations reflect the differences between such entities. As we pointed out in *Schorsten*, a corporation must have a person designated to sign on its behalf, while an individual can ordinarily be expected to sign his own application. 3 FCC Rcd at 4409. Finally, *Amendments*, contrary to Trinchitella's suggestion, does not indicate a general legislative intent to eliminate all burdens on the applicant; it was merely intended to eliminate an oath requirement which was found to be an unnecessary burden on the Commission and the public. *See Amendments*, 27 Fed. Reg. at 9476-77.

Equity Argument

5. Trinchitella argues that his application should have been reinstated on equitable grounds pursuant to case precedent and Commission policy. Trinchitella cites *Communication Gaithersburg, Inc.*, 60 FCC 2d 537 (1976) and *Jane A. Roberts*, 29 FCC 141 (1960), broadcast cases in which we allowed *nunc pro tunc* amendment of applications signed by the applicant's attorney in fact. Trinchitella argues that his case involved the same equitable factors that were found to be relevant in *Gaithersburg* and *Roberts*, *i.e.*, other than the signature, his application was acceptable for filing, he had relied on unsound advice regarding the use of an attorney in fact[9] and he had no intent to deceive the Commission. In addition, Trinchitella argues that the Bureau's decision in *Schorsten*, 2 FCC Rcd at 5422 n.4 and *Pierce*, 2 FCC Rcd at 3523 n.3, recognized the authority of *Gaithersburg* and *Roberts*. In both *Schorsten* and *Pierce*, the Bureau stated that "extraordinary circumstances" (not present in this case) could warrant departure from the signature rule.

Trinchitella asserts that his case also involves extraordinary circumstances. Trinchitella argues that based on the authority of *Gaithersburg* and *Roberts*, as recognized by the Bureau's decisions in *Schorsten* and *Pierce*, the Commission should reinstate his application.

6. Trinchitella also argues that the *Bureau Order* conflicts with the holding in *Jacksonville Cellular Telephone Corp.*, 2 FCC Rcd 6416 (Mob. Serv. Div. 1987), *aff'd*, 3 FCC Rcd 5386 (1988). In *Jacksonville*, the applicant personally signed the Form 401 and certification page stating that his application was complete even though it did not contain, and thus he could not have reviewed, the engineering portion of the application (Schedule B). The MSD held that since there was no misrepresentation or attempt to conceal, and since the application was generally free of defects, the MSD would accept the applicant's recertification that the application was now complete and accurate. Trinchitella argues that the MSD should have applied the equitable exceptions to the Section 22.913(b)(3) certification rule to the Section 1.743 signature rule.

7. The cases Trinchitella cites to show that the Commission has applied equitable principles to accept amendments to cure signature defects involved applications that were processed under the "substantially complete" test as then used in processing broadcast applications, and are therefore not applicable. Under that standard, the Commission permitted applications that had been dismissed because they either violated the Commission's rules or were deficient in informational showings to be resubmitted with a curative amendment and to be afforded *nunc pro tunc* consideration in a comparative hearing so long as they were substantially complete when filed. The rules governing Public Mobile Service applicants are not so generous. Under Section 22.20, Public Mobile Service applications are required to be acceptable for filing when tendered. *See Industrial Communications, Inc.*, 53 RR 2d 38 (1983); *Allen C. Moore*, 86 FCC 2d 787 (Com. Car. Bur. 1981). In the cellular service, this means that an application must satisfy our letter perfect requirements,[10] have complete information showings, and comply with the Commission's rules in order to avoid dismissal pursuant to Section 22.20. Moreover, when a Public Mobile Service application is dismissed pursuant to that provision, the applicant has no right to resubmit a defective application with a curative amendment after the cutoff date for filing competing applications. *See Industrial Communications*, 53 RR 2d at 41-42, *Allen C. Moore*, 86 FCC 2d at 795. As Trinchitella's application was properly dismissed as defective well after the cutoff date for applications in the Casper, Wyoming MSA, the Public Mobile Service rules now preclude consideration of a retendered, corrected application.

8. Despite the irrelevance of the broadcast cases cited by Trinchitella, the Commission does, of course, have authority to waive section 22.20. Here, however, we find no good cause for a waiver.[11] *See* 47 C.F.R. § 1.3. The rule was clear, and Trinchitella failed to comply with it even though he was capable of doing so. Trinchitella argues that his case is extraordinary because during the filing window he was in Canada where he states he was resting and recovering from surgery, pursuant to advice from his doctor that he take a leave of absence from his employment and all matters involving concentration.[12] As the surgery did not preclude his signing the application and as he could have reviewed the application before he left for Canada or while there, these circumstances are not so special as to justify a waiver of the rules. *See* note 14, *infra*. Furthermore, Trinchitella's reliance on SSE's advice is not a mitigating factor. Parties are charged with knowledge of and are bound by statutes and regulations despite reliance to their detriment upon incorrect information received from third parties. *Cf. Rosner v. Secretary of Health, Ed. and Welfare*, 306 F. Supp. 853, 855 (S.D. Fla. 1970). Trinchitella is ultimately responsible for his application and for ensuring that it conforms to Commission rules. *See Schorsten*, 2 FCC Rcd at 5422 n.3 (Com. Car. Bur. 1987).

9. The *Jacksonville* case is clearly distinguishable from Trinchitella's. *Jacksonville* involved an inaccurate certification[13] while the present case involves an applicant's failure to personally sign his application. The *Jacksonville* application contained a certification page correctly located inside the front cover, used the correct format and was signed by the applicant. In contrast, Trinchitella did not *personally* sign his application and therefore failed to comply with the express requirement of Section 1.743 because he did not personally sign his application and did not meet one of the enumerated exceptions contained in section 1.743(b).

Section 1.743(b)

10. Trinchitella argues that the Bureau erred by evaluating the facts of his case under Section 1.743(b) rather than under the standards contained in *Gaithersburg* and *Roberts*. As we explained above, *Gaithersburg* and *Roberts* are not applicable here. Furthermore, the Bureau acted properly in evaluating Trinchitella's case under Section 1.743(b). The Bureau first determined that since the application was not personally signed by Trinchitella, the application failed to meet the requirements of Section 1.743(a). The only exception to the personal signature requirement of Section 1.743(a) is found in Section 1.743(b). *See Schorsten*, 3 FCC Rcd at 4409.

11. Finally, Trinchitella argues that even if section 1.743(b) applies, the Bureau should have concluded that Trinchitella met the requirements of that section. Trinchitella argues that during the filing window, he was outside of the United States, resting and recovering from surgery which had left him disabled and unable to work. Trinchitella also states that his physician advised him to take a leave of absence from his employment and all matters involving concentration. Trinchitella never suggests that he was residing outside of the United States.

12. At the time Trinchitella filed his application, *see supra* note 3, Section 1.743(b) provided that the applicant's attorney could sign the application if the applicant was disabled, or resided outside of the continental United States. The rule further provided that in such cases the attorney must set forth the reason why the application was not signed by the applicant. The Bureau found that Trinchitella did not meet the requirements of Section 1.743(b) since (1) the application was not signed by an attorney,[14] (2) the person signing the application failed to set forth the reason why the application was not personally signed by Trinchitella and (3) Trinchitella had not established his disability. *See Bureau Order* at 3 FCC Rcd at 343-44. The Bureau order reviewed the evidence regarding Trinchitella's physical condition and we affirm its finding that Trinchitella did not establish that he was

physically unable to review and sign a cellular application or that he resided outside the forty-eight contiguous states.[15]

13. Therefore, for the foregoing reasons, IT IS ORDERED that the application for review filed by Ronald F. Trinchitella IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Mr. Napp was an employee of Satellite Systems Engineering, Inc. (SSE), the consulting firm which prepared the application.

[2] *See* Letter to Ronald F. Trinchitella from Chief, Mobile Services Division (March 3, 1987).

[3] *Ronald F. Trinchitella*, 3 FCC Rcd 343 (Com. Car. Bur. 1988) (*Bureau order*).

[4] USCC filed a motion to strike Trinchitella's reply arguing that under Section 1.115(f) of the Commission's rules, replies can only be filed if requested by the Commission. USCC further argues that Section 1.115(d) of the rules does not independently authorize the filing of replies but only sets the time in which authorized replies may be filed. Trinchitella filed an opposition to the motion to strike arguing that USCC had misinterpreted the rules. We find that Trinchitella's reply was properly filed. The restriction on replies contained in the relevant sentence of Section 1.115(f) "appl[ies] only to review of Review Board final decisions." *Amendments to Parts 0 and 1 of the Commission's Rules With Respect to Adjudicatory Re - Regulation Proposals*, 58 FCC 2d 865, 876 (1976). Furthermore, we find that the filing of a reply in this case is authorized by Section 1.115(d), which states in pertinent part "[r]eplies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to the matters raised in the opposition." We recognize that our decision herein departs from some prior interpretations of Section 1.115(f), *see, e.g., The Florida Institute of Technology*, 4 FCC Rcd 1549 at n.1 (1989); *AT&T Communications*, 1 FCC Rcd 100 at n.2 (1987), and we hereby overrule such prior interpretations.

[5] Section 1.743(b) was recently amended, changing "in case the applicant does not *reside in*" the United States to "in case of the applicant's . . . *absence from*" the United States. *See* Revision of Section 1.743 of the Commission's Rules and Regulations, 3 FCC Rcd 2443 (1988). Trinchitella's case must be judged under the rules existing at the time the application was filed.

[6] Trinchitella also argues that it is contradictory for the Bureau to say that the word attorney in Section 1.743(b) refers only to attorneys at law, while also saying that attorneys in fact cannot sign an application under Section 1.743(a). Although that holding was not necessarily contradictory, the Commission has previously held that Section 1.743(b) applies equally to attorneys at law and attorneys in fact (i.e., those exercising a power of attorney). *Bruce M. Schorsten*, 3 FCC Rcd 4409 (1988). This misstatement by the Bureau does not, however, affect the correctness of its decision. As discussed *infra*, the signature of an attorney at law or attorney in fact is only acceptable when the applicant resides outside the country or is disabled; neither of the conditions existed in this case. *See* para. 12, *infra*.

[7] Trinchitella also asserts that the relevant section of the California code is a codification of the Uniform Durable Power of Attorney Act (UDPAA). This factor does not change the result since the federal government has not passed any legislation adopting the UDPAA as federal law.

[8] *See* para. 2 *supra*.

[9] Trinchitella argues that he relied on SSE's advice that someone acting pursuant to a power of attorney could sign the application.

[10] *See Jacksonville Cellular Telephone Corporation*, 3 FCC Rcd 5386 (1988).

[11] Thus, when the Bureau indicated in *Schorsten and Pierce* that "extraordinary circumstances" might warrant our accepting a retendered application that was dismissed as improperly signed, it only meant to suggest that under certain circumstances a waiver of section 22.20 might be justified.

[12] Trinchitella's *Reply to Opposition to Application for Review* at 4.

[13] The Commission decision affirming *Jacksonville* does not address the inaccurate certification issue. *See* 3 FCC Rcd 5386 (1988).

[14] As noted above in footnote six, this part of the Bureau's decision constituted harmless error.

[15] In fact, the record indicates that Trinchitella's last surgery was in November, 1985, and that Trinchitella had since returned to work. The record further shows that Trinchitella's leave of absence from his job began on May 11, 1986. The following day, May 12, Trinchitella decided to file a cellular application. On May 14, Trinchitella traveled to Canada. Sometime between May 12 and May 18, Trinchitella considered SSE's suggestion that the application be signed by an attorney in fact, and Trinchitella signed and returned a power of attorney document. Mr. Napp signed Trinchitella's application, pursuant to the power of attorney, on May 18, 1986, just four days after Trinchitella left the country. Trinchitella did not submit medical evidence regarding his physical condition in May of 1986. Trinchitella did file a letter from his employer stating that in May of 1986 Trinchitella was unable to perform the full scope of his duties in what was described as a stressful management job. This statement, however, does not establish that Trinchitella was unable to review and sign a cellular application.

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 81-742

In the Matter of

Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process

THIRD FURTHER NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

Adopted: March 30, 1989; Released: August 16, 1989

By the Commission: Commissioner Dennis issuing a statement.

INTRODUCTION

1. This *Third Further Notice of Inquiry and Notice of Proposed Rule Making* ("*Third Further Notice*") is a continuation of a comprehensive inquiry into proposals for reforming the standards used for selecting among competing applicants and incumbent licensees in comparative hearings in the license renewal context. The Commission took the first steps to improve the comparative renewal process by adopting a *First Report and Order* in this proceeding which placed limitations on the payments competing applicants and petitioners to deny could receive in exchange for settling their license renewal challenges.[1] In a separate *Report and Order*, the Commission also adopted amendments to FCC Form 301, the form for construction permit applications, that are intended, among other things, to weed out sham and abusive applicants in the license renewal context.[2] We believe these policy and rule changes should prove to be significant steps toward eliminating current incentives and mechanisms for abuse associated with our comparative renewal process.

2. A remaining unresolved area of inquiry relates to the standards used for comparing incumbent licensees and competing applicants in the license renewal context. The Commission has long recognized that its license renewal standards, which have been applied over the years on an *ad hoc* basis, are not ideal for application in the renewal context because they often involve subjective, program-based judgments by the trier of fact. This may result in uncertain application of the standards that is in part responsible for protracted and expensive comparative hearings that may not ultimately improve the quality of the broadcast service the public receives. In our previous *Notices* in this proceeding,[3] we sought comment on proposals for modifying the criteria used for comparing incumbent licensees and competing applicants in a license renewal hearing, as well as the standards used for determining whether an incumbent licensee is entitled to a "renewal expectancy" credit. We are not at this point rejecting any of the alternatives upon which we have previously sought comment. In this *Further Notice*, we are seeking comment on an additional proposal in which we would adopt a new order of proof for determining entitlement to a renewal expectancy credit.

3. Under this additional proposal, the Commission would continue to use its current standard for awarding a renewal expectancy credit -- "meritorious" service to the broadcaster's community of license -- but would adopt a new order of proof for determining entitlement to the credit. Upon demonstrating certain clearly defined, objective evidence at the hearing, an incumbent licensee would be granted a *rebuttable* presumption that it has provided meritorious service sufficient to warrant a renewal expectancy credit. The challenger would then have the opportunity to rebut the presumption with a specific evidentiary showing. The Commission believes that this additional proposal may improve our current process for determining entitlement to a renewal expectancy credit.

BACKGROUND

4. Under Section 309(e) of the Communications Act, a joint comparative hearing is required when two or more applications for a broadcast license are mutually exclusive.[4] The basic elements upon which evidence at a comparative hearing is taken were established in the Commission's *1965 Policy Statement*.[5] These elements were originally devised for comparing applicants for new licenses, but were subsequently applied, in terms of governing the introduction of evidence, to compare incumbent licensees and competing applicants in the renewal context.[6] The principal factors set forth in the *Policy Statement*, or added subsequently, are (1) diversification of control[7] and (2) best practicable service to the public, which includes integration of ownership and management (with possible enhancements for local residence, civic activities, broadcasting experience, and female or minority participation),[8] and efficient use of the frequency.[9]

5. In addition to being evalutated on these comparative factors, an incumbent licensee may be awarded a renewal expectancy credit if it is determined that the licensee's past service to its community of license or service area has been "meritorious". To demonstrate meritorious service sufficient to merit a renewal expectancy, an incumbent licensee must show that its past record has been "substantial" -- that is, "sound, favorable and substantially above a level of mediocre service which might just warrant renewal."[10] A renewal expectancy credit is determined on a sliding scale, measured in accordance with the strength of the licensee's past broadcast record,[11] and is given primary weight in the decision making process *vis-a-vis* the other comparative criteria.[12]

6. The Commission has long recognized that there are problems with the current comparative renewal process.[13] For example, subjective program - based evaluations are required to determine whether a licensee's past service has been meritorious for purposes of awarding a renewal expectancy credit. This can result in an inconsistent or unpredictable application of the meritorious service standard. This uncertainty may, in turn, create opportunities for challengers to take improper advantage of the license

renewal process. These problems compound the difficulties inherent in attempting to meaningfully compare an incumbent's actual performance and a challenger's paper proposals and promises.

7. The Act and case law define the parameters within which the Commission has the discretion to act to reform the comparative renewal process.[14] As noted above, Section 309(e) of the Act requires a joint comparative hearing where two or more applications for a broadcast license are mutually exclusive. In *Citizens Communication Center v. FCC*,[15] and in *Central Florida Enterprises v. FCC* ("*Central Florida I*"),[16] two seminal renewal cases, the U.S. Court of Appeals for the D.C. Circuit held that a challenger is denied a joint comparative hearing as required by Section 309(e) of the Act where a renewal expectancy credit is automatically given controlling or decisive weight *vis-a-vis* the other comparative criteria. The court made it clear that an award of a renewal expectancy credit to an incumbent may not be used by the Commission to create an irrebuttable presumption in favor of license renewal.

8. Notwithstanding these interpretations, courts have recognized that some degree of renewal expectancy is necessary to further the public interest. In *Greater Boston Television Corporation v. FCC*, the court recognized that there are "legitimate renewal expectancies implicit in the structure of the [Communications] Act."[17] In *Citizens*[18] and in a supplemental order to its *Central Florida I* decision,[19] the court recognized that granting a renewal expectancy based on meritorious service is compatible with the full hearing requirement of Section 309(e). Subsequently, in *Central Florida Enterprises, Inc. v. FCC* ("*Central Florida II*"), the court held that a challenger's integration and diversification preferences may be given less weight than an incumbent's renewal expectancy credit based on substantial service.[20]

9. The court in *Central Florida II* recognized numerous public interest benefits associated with affording some type of renewal expectancy:

> (1) There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one. (2) Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded. (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry especially considering the large number of group owners. We cannot readily conclude that such a restructuring could serve the public interest.[21] The court emphasized that the renewal expectancy credit must be factored into the comparative hearing for these and other public benefits and not for the benefit of the incumbent.[22]

10. Over the years, the Commission has attempted to reconcile the tension between recognizing a legitimate renewal expectancy and the requirement that challengers be afforded a full, meaningful hearing with no irrebuttable presumption of license renewal. We believe, as discussed below, that the Commission's additional proposal for adopting a new order of proof may improve the process for awarding renewal expectancy while remaining within the constraints of the statute and pertinent case law.

DISCUSSION

A. *Second Further Notice of Inquiry*

11. In our most recent action in this proceeding, we sought comment, among other things, on several proposals for reforming our renewal expectancy standard. Specifically, we asked for comment on whether we should retain our current meritorious service standard or adopt a modified standard. Included in the proposed modified standards were to award a renewal expectancy where the licensee (1) exercises reasonable judgment in providing programming responsive to its audience, or (2) is in substantial compliance with the Act and Commission rules and policies including those rules related to programming. We also asked for comment on: (1) whether we should retain the current sliding scale; (2) whether we should adopt quantitative guidelines for amount and types of programming that should be imposed; (3) what types of programming should be considered (*i.e.*, just non-entertainment, or entertainment and non-entertainment); and (4) what nonqualitative factors should be considered (*i.e.*, testimony regarding the adequacy of the programming, public service). Finally, we asked whether the proposed reforms would be consistent with Section 309(e) of the Act and applicable case law.[23]

12. While many commenters have responded to our inquiry, there continue to be a number of unresolved difficulties with both the existing process and with some of the alternatives that have been the subject of comment. Under our current sliding scale standard, the "better" the incumbent's past record, the greater the renewal expectancy weight. However, it is difficult to assign a weight without some defined benchmark. For the reasons discussed below, using a *quantitative* benchmark is problematic. Using a *qualitative* benchmark is similarly problematic because, to be maximally effective and consistent with our first amendment concerns, we would need to define qualitative factors that are not subjective and do not involve program-intrusive judgments by the Commission. Finally, the sliding scale makes considerable use of reputation evidence in determining meritorious service. This potentially conflicts with the fundamental first amendment concept that issues of speech and the propriety thereof are not subject to popular referendum or government intrusion.[24]

13. A second option considered involved quantified programming standards. We previously explored the possibility of adopting quantified programming standards for the renewal of television station licenses.[25] After an inquiry, we found that quantitative standards would artificially elevate the level of non-entertainment programming, and would thereby restrict the licensee's programming discretion in contravention of the public interest.[26] We found further that imposing quantitative guidelines for non-entertainment programming would not necessarily increase the quality of service provided.[27] None of the commenters refuted these concerns, or suggested a basis for selecting a standard that could adequately address the multitudinous situations in which the Commission's almost 15,000 authorized broadcast stations exist.[28]

14. The third option considered was to award a renewal expectancy credit if the licensee exercised reasonable judgment in providing programming responsive to its audience's needs. We believe that a licensee's reasonable judgment in programming to meet the needs and interests of its community of license should be a key component of a renewal expectancy credit. We are concerned, however, that this standard, as broadly discussed in the *Second Further Notice*, may suffer from some of the same vagueness and uncertainty in application as our existing standard.

15. A final option considered was to award a renewal expectancy credit if the licensee is in substantial compliance with the Act and Commission rules and policies. This option, if not structured carefully, has the potential for elevating minor infractions of the Commission's policies and rules over past service to the public -- the fundamental factor in determining a renewal expectancy credit. Moreover, it also entails to some degree the making of subjective judgments as to what level of compliance should warrant grant of a renewal expectancy credit.

B. ***New Order of Proof For Awarding Renewal Expectancy***

16. Given our reservations about the renewal expectancy reforms offered for comment to date, we are exploring an additional proposal which we believe may improve upon these proposed reforms. Under this proposal, we would retain the current meritorious service standard, but would adopt a new order of proof for demonstrating meritorious service. We believe a new order of proof may limit the hearing issues and reduce the degree of government intrusion into the editorial judgments and journalistic discretion exercised by a licensee, while continuing to provide a framework for the introduction of evidence sufficient to determine entitlement to a renewal expectancy credit.

17. Specifically, we propose that an incumbent be granted a *rebuttable* presumption that it has provided meritorious service sufficient to warrant a renewal expectancy credit upon presenting certain specified evidence at the comparative hearing. This would shift the burden of proving meritorious service away from the incumbent, and place the burden of proving failure to provide meritorious service on the competing applicant. While we invite comments as to what kinds of evidence should be sufficient to trigger this presumption, our intial thinking is that a licensee could meet the burden of going forward if it presents its "issues/programs" list as provided for in Sections 73.3526(a)(8) and (9) and 73.3527(a)(7) of the Commission's rules. The "issues/programs" list is a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community, and thus may be entitiled to a renewal expectancy.

18. Once an existing licensee has carried this burden of going forward, other applicants would have an opportunity, if they have reason to believe that a renewal expectancy credit is not warranted, to dispute the incumbent's evidentiary showing and the resulting rebuttable presumption. We are also inviting comments as to what kinds of evidence could rebut a presumption of entitlement to a renewal expectancy. For example, a presumption based on compliance with the issues/programs list requirement, as proposed above, could be rebutted by demonstrating that: (1) the licensee did not broadcast programs listed on its issues/programs list; or (2) the programs listed were not responsive to issues of concern to the licensee's audience and the licensee's judgments in this regard were not reasonably made.

19. The licensee's showing and the challenger's rebuttal would be addressed as a preliminary issue in the hearing. Should the judge determine that the licensee did not meet its burden of going forward on the renewal expectancy issue, or that it met its burden but the challenger successfully rebutted the presumption, the issue of whether the incumbent should be awarded any preference for past service would be part of the comparative hearing along with an evaluation of the incumbent and the competing applicants on the other comparative criteria. At this point, because either the licensee has failed to make a *prima facie* showing for the grant of a renewal expectancy credit or its *prima facie* showing was rebutted, the onus would fall upon the licensee to demonstrate that it should receive some type of preference for past service. During that process, the licensee could introduce types of surrebuttal evidence that were not included in its initial showing.[29] Should the judge determine that the challenger failed to sufficiently rebut the presumption of entitlement to a renewal expectancy credit or that a renewal expectancy was appropriate, the incumbent would then be compared with the competing applicants with a preference for past meritorious service. In accordance with *Central Florida II*, this preference would be given significant weight *vis-a-vis* the other comparative criteria.

20. We recognize that this proposal, like those set out in the *Second Further Notice*, may not necessarily cure all the problems we have identified with implementing our current renewal expectancy standard. However, we believe that it has the potential to improve the process for awarding a renewal expectancy without incurring some of the problems associated with the other proposals. If a licensee is successful in making an unrebutted *prima facie* showing, this could narrow the issues at the hearing, thereby making the hearing simpler and less expensive. The proposed procedure could also reduce or eliminate the need for exhaustive inquiry at the hearing into a licensee's program-related judgments. Finally, the proposal may reduce the emphasis on reputation evidence in the current renewal process. Under our proposal, the focus in the incumbent's threshold case would be on programming to meet the needs and interests of the community rather than on the testimony of community and government leaders about the station. This shift in initial focus may reduce the possibility that a broadcaster would compromise its independence in its editorial and programming judgments simply to insure support from community and government leaders at renewal time.

21. In addition, we believe this proposal fully conforms with the substantive and procedural requirements of the Communications Act. Consistent with the statute, as interpreted by *Ashbacker*, *Citizens Communications* and more recent case law, a full hearing is accorded to all applicants. The presumption of entitlement to a renewal expectancy credit is, by definition, rebuttable upon a specific showing by the challenger. While our burden-shifting proposal continues to afford the incumbent an advantage in the comparative process, the court in *Central Florida II* has specifically sanctioned such an advantage so long as it is applied to assure better service to the public rather than to protect any private interest in the license. As explained above, our proposal is designed to better serve the public interest.

22. Accordingly, we request comment on whether our burden-shifting approach will be an improved method for applying our meritorious service renewal expectancy standard. We specifically request comment on the workability of the proposal. Will the procedure, in practice, narrow the hearing issues and reduce Commission involvement in scrutinizing broadcasters' program-related judgments? Will this proposal provide more certain guidelines for determining the likelihood that a license will or will not be renewed? Will this, in turn, encourage incumbents to invest in their broadcast facilities, and thereby ensure the quality of service rendered?

23. We also request comment on the type of evidence that should be required to grant an incumbent a presumption of entitlement to a renewal expectancy credit, as well as the type of showing that should be required by the challenger to rebut the presumption. We specifically request comment on the Commission's proposal that the incumbent's submission of its "issues/programs" list constitute a *prima facie* showing, including comment on what, if any, rule changes are needed to implement the proposal. We note that we have described a broad framework for applying our burden-shifting proposal. We urge commenters to suggest details as to how the proposal should be applied in practice. For example, at what stage in the hearing and by what procedural mechanism should the parties be required to make or rebut a *prima facie* showing? Does the procedure suggested afford the challenger sufficient opportunity for discovery of rebuttal evidence?

24. Furthermore, we request comment on whether this proposal is consistent with the comparative hearing requirement of Section 309(e) as interpreted in *Citizens Communications* and *Central Florida I and II*. Specifically, does the rebuttable presumption permit a fair and meaningful comparison between the incumbent and challengers? Finally, we request commenters to evaluate the burden-shifting proposal described herein *vis-a-vis* the other renewal expectancy reforms proposed in the *Second Further Notice*. Which of all of the proposals discussed do the commenters believe will best achieve the Commission's goals and why?

CONCLUSION

25. Through this further inquiry, we are continuing our search for an improved comparative renewal process. It is well established that affording a licensee, which has successfully served the needs and interests of its community of license, some credit in a license renewal hearing furthers important public interest goals. It is equally well established that where competing applications are filed against license renewal applications, all competing applicants must be afforded a comparative hearing in which the merits of all applicants are fully weighed.

26. The substantial comments submitted to date in this proceeding have assisted the Commission in scrutinizing numerous proposals for reform of its renewal expectancy standard. We now seek comment on an additional proposal for awarding a renewal expectancy credit. Under this proposal, the Commission would adopt a new order of proof for determining whether an incumbent is entitled to a renewal expectancy credit. We believe that this burden-shifting proposal may improve our current method of awarding a renewal expectancy credit and further the public interest policies underlying a renewal expectancy, while fully complying with the hearing requirement of the Communications Act.

FURTHER INITIAL REGULATORY FLEXIBILITY ANALYSIS

27. As required by Section 603 of the Regulatory Flexibility Act, a further initial regulatory flexibility analysis of the expected impact of our proposed reform on small entities is set forth below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Third Further Notice of Inquiry and Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

I. Reason for the Proceeding: As set forth in the intitial regulatory flexibility analysis, 88 FCC 2d 120, 126-27 (1981), this proceeding was instituted to clarify the process for determining when an incumbent licensee's past service was worthy of a renewal expectancy credit in a license renewal proceeding and to determine whether the comparative criteria or procedures used to compare incumbent licensees and competing applicants in a renewal proceeding should be modified or deleted.

II. Objective of this Proceeding: The objective of this proceeding is to seek further comment on an additional proposal for reforming the renewal expectancy process. Specifically, the Commission seeks comment on a proposal to adopt a new order of proof for determining entitlement to a renewal expectancy credit.

III. Legal Basis: The legal basis for this action is contained in Sections 4(i) and (j), 303(r) and 403 of the Communications Act of 1934, as amended.

IV. Number and Type of Small Entities Affected: The entities affected will be broadcast licensees who are seeking license renewal and applicants for construction permits for broadcast facilities that are mutually exclusive with facilities subject to license renewal. All broadcasters and competing applicants, including small entities and entrepreneurs, could benefit from the additional proposal set out herein. The new order of proof could limit the issues in some license renewal hearings, thereby making them simpler and less expensive, and could reduce unnecessary Commission oversight of broadcasters' program-related judgments.

V. Reporting, Recordkeeping and other Compliance Requirements: One goal of the proposed reform is to make comparative renewal hearings simpler and less expensive for both incumbent licensees and competing applicants. Another goal is to reduce unnecessary Commission oversight of broadcasters' program-related judgments. Many broadcasters continue to maintain records beyond those required by the Commission in

anticipation of license renewal issues arising. Adoption of a new order of proof may permit licensees to reduce their private record keeping, consistent with the intent behind our radio and television deregulation orders.

VI. Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rule: None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action: Other than the proposals set forth in this and earlier *Notices* in this proceeding, we believe that no alternative approach, that is consistent with the Communications Act and applicable case law, would minimize to any greater extent than the proposed reforms the impact of the renewal process on small entities.

PROCEDURAL MATTERS

28. Accordingly, the Commission adopts this *Third Further Notice of Inquiry and Notice of Proposed Rule Making* pursuant to the authority contained in Sections 4(i) and (j), 303(r) and 403 of the Communications Act of 1934, as amended.

29. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **October 10, 1989** and reply comments on or before **October 25, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

30. For purposes of this non-restricted notice and comment proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

31. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

32. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

33. For further information on this proceeding, contact Marilyn Mohrman-Gillis, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *First Report and Order in BC Docket No. 81-742*, FCC 89-108 (released May 16, 1989), *summarized in* 54 Fed. Reg. 22595 (May 25, 1989).

[2] *Report and Order in Gen. Docket No. 88-328*, 4 FCC Rcd 3853 (1989).

[3] *Notice of Inquiry in BC Docket No. 81-742*, 88 FCC 2d 120 (1981); *Further Notice of Inquiry in BC Docket No. 81-742*, 47 Fed. Reg. 46117 (Oct. 15, 1982); *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742*, 3 FCC Rcd 5179 (1988).

[4] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945). Although *Ashbacker* dealt with two mutually exclusive applications for a new construction permit, the Commission and the court have interpreted it to require a hearing for two or more mutually exclusive applications in the comparative renewal context as well. *See Citizens Communications Center v. FCC*, 447 F.2d 1201, 1211 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972).

[5] 1 FCC 2d 393 (1965).

[6] *See Seven (7) Leagues of Productions*, 1 FCC 2d 1597 (1965).

[7] The diversity criterion is applied by assessing demerits against applicants or principals who have other media interests (broadcast, cable, low power television, movie, and telephone) on either a local, regional, or national level. A comparative preference is awarded to the applicant that will diversify media ownership to the greatest extent.

[8] The integration criterion is applied by determining the percentage of time an applicant's owners will participate in station management. This quantitative figure may be enhanced

to the extent the integrated owners (1) are past or proposed local residents of the station's community of license or service area; (2) are minorities or females; (3) have participated in civic activities; or (4) have past broadcast experience.

[9] Preferences are awarded for comparative coverage of service where there are differences in the area and population to be served (i.e., a strong preference is awarded if an applicant proposes a first or second night time service) and for proposed use of auxiliary power equipment for AM and FM stations in case of commercial power failure.

[10] *Cowles Broadcasting, Inc,* 86 FCC 2d 993, 1006 (1981) *("Cowles II"), aff'd sub nom. Central Florida Enterprises, Inc. v. FCC.,* 683 F.2d 503 (D.C. Cir. 1982), *cert. denied,* 460 U.S. 1084 (1983) *("Central Florida II").*

[11] In determining the renewal expectancy weight, the Commission has looked primarily at (1) the amount of non-entertainment programming presented, the time of day it is presented and whether it is directed to local needs and interests, (2) the amount of locally produced programming, and (3) the reputation of the station in the community. *See, e.g., Radio Station WABZ, Inc.,* 90 FCC 2d 818, 840-42 (1982), *aff'd sub nom. Victor Broadcasting v. FCC,* 722 F.2d 756 (D.C. Cir. 1983).

[12] *See Cowles II,* 86 FCC 2d at 1015 ("[S]tructural factors such as integration and diversification -- of primary importance in a new license proceeding -- should have lesser weight compared with the preference arising from substantial past servcice.").

[13] Even before initiating this proceeding in 1981, the Commission tried unsuccessfully to reform the comparative renewal process by attempting to quantify meritorious service required for renewal expectancy. *See Notice of Inquiry* in Docket No. 19154, 27 FCC 2d 580 (1971); *Further Notice of Inquiry,* 31 FCC 2d 443 (1971); *Second Further Notice of Inquiry,* 43 FCC 2d 367 (1973); *Third Further Notice of Inquiry,* 43 FCC 2d 1043 (1973). Ultimately, the Commission declined to adopt quantitative programming standards because it concluded, among other other things, that the proposals then before it would restrict the licensee's programming discretion. *See Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing Process,* 66 FCC 2d 419 (1977) *("Quantitative Guideline Report and Order"), aff'd sub nom. National Black Media Coalition v. FCC,* 589 F.2d 578 (D.C. Cir. 1978).

[14] A comprehensive discussion of the statutory and adjudicatory underpinnings of our comparative renewal criteria is contained in our *Second Further Notice* at ¶¶ 40-60.

[15] 447 F.2d 1201. *In Citizens Communications,* the court invalidated a Commission policy *(Policy Statement Regarding Renewal,* 22 FCC 2d 424, 425 (1970)) in which the Commission found that a license would be renewed, without addressing the merits of competing applications, if the incumbent was "substantially attuned" to meeting the needs and interests of the licensee's service area and was not characterized by "serious deficiencies." The court held that this approach violated Section 309(e) of the Act because it deprived challengers of a hearing on the merits of their applications.

[16] 598 F.2d 37 (D.C. Cir. 1978), *reh. en banc denied and modified,* 598 F.2d 37 (1979), *cert. dismissed,* 441 U.S. 957 (1979). *In Central Florida I,* the court reversed and remanded the Commission's decision in *Cowles Florida Broadcasting Inc.,* 60 FCC 2d 372 (1976), *recon. denied and clarified,* 62 FCC 2d 953 (1977), *further recon. denied,* 40 RR 2d 1627 (1977) *("Cowles I")* in which the Commission gave decisive weight to an incumbent's "substantial" past performance despite preferences awarded the challenger for diversification and integration. The court was concerned, among other things, that the Commission had renewed the license based on "substantial" service without regard for the other comparative criteria. 598 F.2d at 56-57. The court remanded to the Commission to reconsider the incumbent's past performance and articulate how these findings were integrated with the other comparative factors. *Id.* at 58.

[17] 444 F.2d 841, 854 (D.C. Cir. 1970).

[18] 447 F.2d at 1213.

[19] 598 F.2d at 60.

[20] 683 F.2d 503 (D.C. Cir. 1982), *cert. denied,* 460 U.S. 1084 (1983). The court affirmed a Commission decision in *Cowles Florida Broadcasting Inc.,* 86 FCC 2d 993 (1981) *(Cowles II)* to grant a license renewal to the incumbent where its past performance was "substantial" even though the challenger held advantages over the incumbent on the integration factor ("slight") and diversification factor ("clear") and the incumbent was in violation of one of the Commission's rules. In contrast to the Commission's decision in *Cowles I (n. 16 supra),* the court was satisfied that the Commission in *Cowles II* "painstaking[ly]" and "explicit[ly]" balanced the incumbent's past record with the other comparative factors. 683 F.2d at 508.

[21] *Id.* at 507 (emphasis deleted). Accord *Victor Broadcasting, Inc. v. FCC,* 722 F.2d 756.

[22] *Central Florida II,* 683 F.2d at 507.

[23] We also sought comment on whether the diversification, integration and spectrum efficiency criteria should be eliminated or diminished in weight in light of their less meaningful role in renewal hearings. We are not specifically seeking additional comment on proposed reforms of these criteria. However, commenters are welcome to address these issues if they believe they are pertinent to their comments regarding the renewal expectancy issues raised herein.

[24] *See Weaver v. Jordan,* 411 P.2d 289 (1966), *cert. denied,* 385 U.S. 844 (1966).

[25] *See* n. 13 *supra.*

[26] *Quantitative Guideline Report and Order,* 66 FCC 2d at 428-29. In approving the Commission's rejection of quantitative guidelines, the court noted this approach "would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission." *See National Black Media Coalition v. FCC,* 589 F.2d at 581.

[27] 66 FCC 2d at 427.

[28] We believe the proposal made by numerous commenters for an optional quantitative standard suffers from the same problems as an absolute standard. Because of the significant downside risk associated with failing to achieve an expectancy credit, it is likely that licensees would treat "optional" quantitative standards as rigid requirements. Thus, we are concerned that there would be little practical difference between absolute and optional quantitative standards.

[29] This could include evidence regarding the factors the Commission currently considers in determining whether to grant a renewal expectancy. *See* n. 11 *supra.*

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: In the Matter of Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process (BC Docket No. 81-742).

As this *Third Further Notice* states, the Commission has tried repeatedly since 1971 to reform the process of rewarding a renewal expectancy. These efforts, though well-intentioned, have been limited by Section 309 of the Communications Act and by Court interpretations of the Act. *See, e.g., Ashbacker Radio Co. v. FCC*, 326 U.S. 527 (1945); *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). Given the current law, we might not be able to make significant improvements. It may be time for Congress to reexamine this issue, and give the Commission authority to adopt a "two-step" renewal process, under which we would first examine the incumbent's performance and then consider challenges only if the incumbent's performance is unsatisfactory. If Congress does not act, I cannot be optimistic that meaningful reform will result from this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-354

In the Matter of

Amendment of Parts 2 and 15
of the Rules with regard to the
operation of spread spectrum
systems

NOTICE OF PROPOSED RULE MAKING

Adopted: August 9, 1989; Released: August 16, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend its rules concerning spread spectrum systems to specify a minimum spreading code length for direct sequence systems operating under the Part 15 rules.[1] This action is being taken in response to a number of informal inquiries from industry regarding the minimum spreading code length a system must employ in order to qualify as a spread spectrum system under the Part 15 rules. We are also proposing, *inter alia,* to increase the channel bandwidth for frequency hopping systems from 25 kHz to 500 kHz. These proposals are expected to increase the flexibility for design of Part 15 spread spectrum systems and thereby broaden their development and use.

BACKGROUND

2. Spread spectrum communications systems use special modulation techniques that spread the energy of the signal being transmitted over a very wide bandwidth. The information to be conveyed is modulated onto a radiofrequency (RF) carrier by some conventional technique such as AM, FM, or digital, and the bandwidth of the signal is then deliberately widened by means of a spreading function. The spreading technique used in the transmitter is duplicated in the receiver to enable detection and decoding of the signal. Spread spectrum systems offer two important technological advantages over conventional transmission schemes. First, the spreading reduces the power density of the signal at any frequency within the transmitted bandwidth, thereby reducing the probability of causing interference to other signals occupying the same spectrum. Second, the signal processing in spread spectrum systems tends to suppress undesired signals, thereby enabling such systems to tolerate strong interfering signals. This results in significantly higher signal to noise ratios than can be achieved by conventional systems such as amplitude modulation (AM) that use no bandwidth spreading. The improvement in signal to noise ratio is termed "processing gain."

3. The two most common types of spread spectrum systems are direct sequence and frequency hopping. Direct sequence systems combine the information signal, which is usually digital, with a much faster stream of *binary code.* The combined information and code signal is then used to modulate an RF carrier. Since the binary code dominates the modulating function, it is the direct cause of the wide spreading of the transmitted signal. This code is a fixed-length pseudorandom sequence of bits. The system continuously recycles the same binary code. Frequency hopping systems spread their energy by changing, or "hopping", the center frequency of the transmission many times a second in accordance with a pseudorandomly generated list of channels. The same list, or sequence, of channels is used repeatedly, so that the transmitter continuously recycles the same series of channel shifts.

4. A spread spectrum system's performance in terms of minimizing interference to other signals and improving processing gain is determined in large part by the attributes of the pseudorandom sequence, or "spreading code," used to spread the RF carrier. The degree to which interference to other signals is reduced depends on the length of the spreading code, i.e., the number of bits or channels in the code and the rate at which the bits are generated or the channels are hopped.[2]

5. On May 9, 1985, in the *First Report and Order* in GEN Docket No. 81-413, the Commission, *inter alia,* authorized the operation of low power, non-licensed spread spectrum systems under Part 15 of the rules.[3] Because of their lower interference potential, spread spectrum systems operating under Part 15 are permitted greater output power (up to 1 watt) than most other Part 15 devices. The Part 15 rules limit spread spectrum operations to direct sequence and frequency hopping systems. These rules provide that direct sequence systems must have a 6 dB bandwidth of at least 500 kHz. For frequency hopping systems, the rules limit hopping channel bandwidth to a maximum of 25 kHz. The rules also specify that such systems must use at least 75 hopping frequencies, separated by at least 25 kHz; and that the average time on any one frequency can not exceed 0.4 seconds within a 30 second period.

6. Over the past several years, the Commission's staff has received many inquiries regarding the requirements of the rules affecting the design of direct sequence spread spectrum systems. In particular, these inquiries have indicated that the rules do not provide adequate guidance regarding the spreading code length required for a direct sequence system. The present rules do not set a minimum length for the spreading codes of direct sequence systems. However, a minimum spreading code length is necessary to insure that the energy of the signal is distributed evenly over the transmitted bandwidth. This even distribution of energy limits the potential of the system to cause interference to authorized services. The parties making these inquiries state that the absence of a specification for minimum spreading code length creates uncertainty as to whether a given system qualifies as a spread spectrum system under the rules and, thereby is inhibiting the development of such systems. Other informal discussions with system developers indicate that the present rule limiting Part 15 spread spectrum systems to a hopping channel bandwidth of 25 kHz may be overly restrictive and thus inhibiting the development of these systems.

7. The *Notice of Proposed Rule Making* in General Docket No. 87-389 sought comments on the minimum processing gain that a spread spectrum system should achieve.[4] In the *Report and Order* in that proceeding, the Commission indicated that the record did not provide sufficient information to support a decision on the processing gain issue and that it intended to pursue the issue in a further rule making proceeding.[5]

DISCUSSION

8. From our discussions with developers of Part 15 spread spectrum systems and our experience with theses systems since 1985 when they were first authorized, we believe it is necessary and desirable to make certain changes to the Part 15 rules for operation of spread spectrum systems. In particular, we are proposing to amend the technical standards for direct sequence systems to ensure adequate spreading of their transmitted signals and to expand the permissible channel bandwidth for frequency hopping systems. The proposed rule changes, which are discussed below, are intended to further encourage the development and operation of Part 15 spread spectrum systems. In addition, the proposed amendments to the standards would serve to strengthen the rules to ensure that systems using this technique pose the minimum risk of interference to other signals.

9. *Spreading code.* Spread spectrum systems, because of the relatively high power which they are allowed to transmit under Part 15,[6] have the potential to cause interference to authorized radio services unless their transmitted energy is spread evenly and uniformly over a sufficiently broad bandwidth. To ensure the uniform spreading of their transmitted energy, pseudorandom sequences of appropriate length are normally used to produce the spreading code.[7] If pseudorandom sequences were not used, certain portions of the radiated emissions could contain high peak levels. Since any communications system may be in an idle state for a period of time or may transmit a highly repeating pattern of information during a particular event, a minimum length of the spreading code is needed to minimize the interference potential of these systems.

10. In developing an appropriate minimum length standard for the spreading code for Part 15 direct sequence systems, we reviewed the spread spectrum rules in the Amateur Radio Service. Many of the same interference concerns we are addressing herein were considered when the spread spectrum rules for the Amateur Radio Service were implemented. Section 97.71 of the Amateur Rules specifies that a maximum-length linear shift register of 7 stages is to be used to produce the spreading code for direct sequence systems. A shift register of 7 stages with suitable feedback between its stages can produce several different pseudorandom sequences of 127 bits in length. We believe that a spreading code of this type also would be a reasonable minimum standard for direct sequence spread spectrum systems operating under the Section 15.247 rules also.

11. Because amateur communications are normally meant to be open and accessible to others, the Section 97.71 rules allow only one of the pseudorandom sequences that can be produced in a maximum-length linear shift register of 7 stages to be used as a spreading code. On the other hand, the Part 15 rules allow the use of all of the pseudorandom sequences, so that devices of the same manufacturing type can be operated by different users within proximate range of one another without interference. If more coded sequences are needed than can be generated in a 7 stage shift register, a manufacturer can use a shift register of 8 or more stages. Thus we are proposing that, for direct sequence systems, a pseudorandom code of at least 127 bits in length be used to generate the spread spectrum emission under Section 15.247.

12. We are also proposing that alternative means may be used to generate the spreading code provided that the spreading code does not repeat before 127 bits have been generated. One alternative, for example, is to use a pseudorandom generator that produces a shorter sequence of bits in combination with a data scrambler to achieve the necessary equivalent length of the spreading code. (A data scrambler is a device that makes data appear to be more random.) If used, the combination of a pseudorandom generator and data scrambler would have to be designed to produce sequences which are at least as random as those using a spreading code containing 127 bits. Comments are requested on the suitability of using a data scrambler or other alternative means of generating a minimum length spreading code.

13. An alternative method of achieving the same end as the previous paragraph would be to have a standard which measures the spectral flatness of the emission. For example, an instrument such as a spectrum analyzer could be used to measure 1,024 frequency points between the 6 dB points of the emission, and the ratio of the standard deviation to mean of these points could be compared with a limit. The magnitude of this ratio would be a direct measure of the spectral evenness and hence interference potential. We seek comment on this possible alternative to the language in the proposed Section 15.247(d) and other possible alternatives for achieving this goal.

14. Minimizing the interference potential of a spread spectrum system also requires that the signal be spread over a sufficiently wide bandwidth. The amount of spreading produced by a direct sequence system is dependent on the rate at which the spreading code is generated. Thus, processing gain, which is a measure of signal spreading, can be specified to ensure that the system provides adequate spreading. Some parties have informally suggested that we adopt a processing gain standard for this purpose. In reviewing the need to specify a minimum standard for processing gain, we observe that the existing rules provide that a direct sequence system must operate with a minimum 6 dB bandwidth of 500 kHz. As we are aware of no information indicating that this standard does not require adequate signal spreading, we now believe that a minimum standard for processing gain would be redundant regulation and therefore is unnecessary. However, comments are requested on the need for specification of a minimum processing gain standard to ensure that a system provides sufficient spreading. We also wish to consider whether such a standard might be needed to ensure that a spread spectrum system, and not just a spread spectrum transmitter is used. The latter issue also raises the question of the possible application of a processing gain standard to equipment used to receive spread spectrum signals. One aspect of policy in this area would be the possible testing of both transmitters and receivers for compliance as part of the certification procedure for Part 15 spread spectrum systems. We invite comments on these issues.

15. *Frequency Hopping Systems.* The present Part 15 rules limit frequency hopping systems to a channel bandwidth of 25 kHz. This channel bandwidth was chosen to provide for conventional FM voice communications. It now appears that such a channel limitation may be overly restrictive for certain other uses, such as, high capacity (250 kilobit and higher) data transmissions. We believe that it would be in the public interest to provide manufacturers and users with greater flexibility in the choice of channel bandwidths. [8] Accordingly, we are proposing to allow frequency hopping systems to utilize wider channel bandwidths. We recognize that increasing the channel bandwidth will increase the probability that emissions from a frequency hopping system are present in any portion of the frequency band. However, the potential interference from such systems will, in most instances, be significantly less since the transmitted power is being spread over a much larger channel bandwidth. Thus, we feel it is reasonable to allow frequency hopping systems to operate with larger channel bandwidths. We are proposing that channel bandwidths of up to 500 kHz may be used.[9] A channel bandwidth of 500 kHz would permit the development of high capacity data transmission systems. Further, spreading the signal over a 500 kHz bandwidth would reduce the signal energy by over 20 dB when compared to the present permitted channel bandwidth of 25 kHz. We believe such a change would not result in any significant increase in potential interference. We request comments on this approach and our choice of maximum permitted channel bandwidth.

16. The existing rules effectively specify a minimum spreading code standard for frequency hopping systems by requiring use of at least 75 hopping frequencies.[10] To clarify the intent of this rule, we are proposing to add a statement that each hopping frequency must be selected at least once in the spreading sequence before it repeats.

17. To further reduce the interference potential of frequency hopping spread spectrum systems, we are proposing to reduce and change the manner in which the average time of occupancy on any hopping channel is specified. In the present Section 15.247 rules, the average time of occupancy on any frequency may not be greater than 0.4 seconds within a 30 second period. For a 75 channel system, this implies a minimum hopping rate of 2.5 hops per second. We feel, based partly on discussions with equipment system developers since the *First Report and Order,* that the 30 second averaging period is too long. Some system developers have attempted to use the slowest hopping rate allowed to propose systems that transmit all of their information in one frequency hop. These systems have a net processing gain of zero and are not spread spectrum systems. Additionally, the 2.5 hops per second hopping rate allowed by the present rule is inconsistent with the 10 hops per second rate allowed in the Police Radio Service by Section 90.19 (g)(3) of the rules and with guidelines for frequency coordinators incorporated in the *First Report and Order* as Appendix C. Although these guidelines were intended to apply to the Police Radio Service, the recommendations made therein are intended to address the interference potential of spread spectrum systems to traditional systems and are equally applicable to the Part 15 circumstances. The guidelines recommend that all frequency hopping systems hop at a rate greater than 10 hops per second. Therefore, we propose to reduce the average channel occupancy time in all three bands to 100 milliseconds, and to reduce the averaging time to 5 seconds in the 902-928 MHz band and 7.5 seconds in the 2400-2483.5 MHz and 5725-5850 MHz bands. This would implicitly require a minimum hopping rate of 10 hops per second.

PROCEDURAL MATTERS

18. In accordance with the procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before **Oct. 2, 1989,** and reply comments on or before **Oct. 17, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, providing that such information or a writing indicating the nature and source of such information is placed in the public files, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

19. In accordance with the provisions of Section 1.419 of the Commission's Rules, formal participants shall file an original and five (5) copies of their comments and other materials. Participants wishing each Commissioner to have a copy of their comments should file an original and ten (10) copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All comments should be clearly marked General Docket No. 89-354, and will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C. All written comments should be sent to: Secretary, Federal Communications Commission, Washington, D.C., 20554. For general information on how to file comments, please contact the FCC Consumer Assistance and Small Business Division at (202) 632-7000.

20. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that ex parte presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

21. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's

Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.206.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

22. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and purpose of this action:

This proposed rule making is intended to clarify the intent and application of the present Part 15 spread spectrum rules and to respond to numerous inquiries made to the Commission by industry over the past several years. The proposed rule changes are expected to aid industry in the design and implementation of spread spectrum systems by giving them clear and reasonable standards for selection of their system's spreading code and processing gain. The proposed rule changes also will reduce the Commission's workload by eliminating many of the inquiries that the Commission now receives concerning spread spectrum systems.

II. The objectives:

The objective of these proposed rule changes is to encourage and facilitate the development and operation of Part 15 spread spectrum systems.

III. Legal basis:

Action proposed herein is taken pursuant to Section 4(i) and 303 of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected:

The Rules proposed here are clarifications of the intent and usage of the present Rules. As such, they should prove to be beneficial to all businesses especially small business entities. Beyond this, we are unable to quantify the potential effects of this action on small entities. Interested parties are invited to comment on the economic impact the proposed rule changes may have on small business entities.

V. Recording, record keeping and other compliance requirements:

The proposed modifications to Parts 2 and 15 of the Rules would require no additional record generation by manufacturers of Part 15 spread spectrum systems. However, one option under consideration would require receivers used with spread spectrum systems to be submitted for testing as part of the equipment certification procedure.

VI. Federal rules which overlap, duplicate or conflict with this rule:

None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objective:

The only significant alternative available to the Commission would be to maintain the status quo and not propose these rules. However, this would not be to the advantage of either industry or the general public, since it would offer industry no clear guidelines on how final system designs could be achieved without causing interference to other communications systems.

23. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no additional information collection requirement on the public.

24. The Secretary shall cause a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 et seq., (1981)).

25. In view of the foregoing and pursuant to Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 303(r), IT IS PROPOSED to amend Parts 2 and 15 as set forth in the attached Appendix.

26. For further information on this proceeding, contact Dr. Joseph McNulty, Laboratory, Office of Engineering and Technology, 7435 Oakland Mills Road, Columbia, Maryland, 21046, (301) 725-1585.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PROPOSED CHANGES FOR FCC RULES AND REGULATIONS PART 2 AND PART 15 CHANGES

A. Title 47 of the Code of Federal Regulations, Part 2, is proposed to be amended as follows:

1. The authority citation for Part 2 would continue to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307.

2. Section 2.1 would be amended by inserting the following definition in alphabetical order:

Section 2.1 Terms and definitions

* * * * *

Pseudorandom Sequence. A sequence of binary data which has some of the characteristics of a random sequence but also has some characteristics which are not random. It resembles a true random sequence in that the one bits and zero bits of the sequence are distributed randomly throughout every length, N, of the sequence and the total numbers of the one and zero bits in that length are approximately equal. It cannot be called a true random sequence however because it consists of a fixed number (or length) of coded bits which repeats itself exactly whenever that length is exceeded, and because it is generated by a fixed algorithm from some fixed initial state.

* * * * *

B. Title 47 of the Code of Federal Regulations, Part 15, is proposed to be amended as follows:

1. The authority citation for Part 15 would continue to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.247 would be amended by revising paragraph (a)(1) and adding new paragraph (d) as follows:

Section 15.247 Operation within the Bands 902-928 MHz, 2400-2483.5 MHz, and 5725-5850 MHz

(a) * * * * *

(1) Frequency hopping systems shall have nonoverlapping hopping channels and the 20 dB bandwidth of the hopping channel shall not exceed 500 kHz. The hopping channel carrier frequencies shall be separated by at least 25 kHz, or the 20 dB bandwidth of the hopping channel whichever is greater. At least 50 hopping frequencies shall be used for frequency hopping systems operating in the 902-928 MHz band; at least 75 hopping frequencies shall be used for frequency hopping systems operating in the 2400-2483.5 MHz and 5725-5850 MHz bands. The average time of occupancy on any frequency shall not be greater than 100 milliseconds within a 5 second period for frequency hopping systems operating in the 902-928 MHz band, and 100 milliseconds within any 7.5 second period for frequency hopping systems operating in the 2400-2483.5 MHz and 5725-5850 MHz bands. Each hopping frequency must be selected at least once in the hopping sequence before it repeats.

* * * * *

(d) For direct sequence systems, a pseudorandom spreading code which generates at least 127 binary bits before repeating shall be used. Alternative codes to produce the spreading for direct sequence systems will be accepted provided that the spreading of the resulting emissions is at least as random as that which would be produced using a code which generates 127 bits before repeating.

* * * * *

FOOTNOTES

[1] A spread spectrum system is an information bearing communications system in which: (1) Information is conveyed by modulation of a carrier by some conventional means, (2) the bandwidth is deliberately widened by means of a spreading function over that which would be needed to transmit the information alone. (In some spread spectrum systems, a portion of the information being conveyed by the system may be contained in the spreading function.)

[2] Minimizing the potential for interference to narrowband transmission systems operating within the same bandwidth requires that the signal be spread uniformly over the transmission bandwidth. The uniformity of the spreading is a function of the length of the spreading code, i.e., the number of bits or channels in the code. The interference potential also is a decreasing function of the occupied bandwidth. The occupied bandwidth is determined by the rate at which the bits are generated or the number of different channels in the hopping sequence.

[3] *See First Report and Order* in GEN Docket No. 81-413, 50 FR 25234 (1985).

[4] *See Notice of Proposed Rule Making,* GEN Docket No. 87-389; 2 FCC Rcd 6135 (1987).

[5] *See Report and Order,* GEN Docket No. 87-389; FCC 87-103, released April 18, 1989. However, in that action the Commission did recodify and clarify the existing Part 15 rules for spread spectrum devices. *See* 47 CFR Section 15.247.

[6] Spread spectrum systems are allowed to transmit 1 watt of power under Part 15. This is a relatively high amount of power in comparison to the power allowed for most other Part 15 devices.

[7] A pseudorandom sequence is a sequence of binary data which has some of the characteristics of a random sequence but also has some characteristics which are not random. It resembles a true random sequence in that the one bits and zero bits of the sequence are distributed randomly throughout every length, N, of the sequence, and the total numbers of the one and zero bits in that length are approximately equal. It cannot be called a true random sequence however, because it consists of a fixed number (or length) of coded bits which repeats itself exactly whenever that length is exceeded, and because it is generated by a fixed algorithm from some fixed initial state. Such sequences when generated in maximum-length linear shift registers are also called maximal sequences, maximal length sequences, maximum-length linear shift register sequences, linear m-sequences and pseudo-noise sequences.

[8] For example, one manufacturer has informed us that his studies indicate that it is feasible to develop and market a low-cost 250 kilobit wireless local area network (LAN) for networking personal computers using frequency hopping technology if hopping channel bandwidths of at least 500 kHz were available.

[9] Increasing the channel bandwidth to 500 kHz will require a concommitent change in the minimum number of hopping frequencies from 75 to 50 for systems operating in the 902 to 928 MHz band.

[10] *See* 47 CFR Section 15.247(a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-375

In the Matter of

Amendment of Part 73 of the Rules	RM-6236
to provide for an additional FM	RM-6237
station class (Class C3) and to	
increase the maximum transmitting	
power for Class A FM stations	

SECOND REPORT AND ORDER

Adopted: July 13, 1989; Released: August 18, 1989

By the Commission: Commissioner Dennis issuing a statement.

INTRODUCTION

1. The Commission has under consideration in this proceeding proposed amendments to Part 73 of its Rules governing the broadcast services. In this *Second Report and Order*, we are increasing the maximum permitted effective radiated power for Class A FM broadcast stations from 3000 to 6000 watts. To reduce any adverse effect this power increase might otherwise have on the service of Class B and B1 stations, we are adopting rules that will implement the power increase on a selective basis, rather than as a blanket increase. We are also revising the minimum distance separation requirements applicable to Class A stations in order to maintain the current level of protection for the service of FM stations of all classes. Existing stations at locations that do not meet one or more of the revised requirements are "grandfathered." That is, we will allow modifications and relocations of such stations under the previous power limit and distance separation requirements, or under technical conditions that present no greater interference potential than the previous limit.

2. Under these new rules, the majority of existing Class A FM broadcast stations will be able to operate with increased power. We are adopting licensing procedures that will allow many Class A stations to begin operation with increased power prior to filing an application for such operation, and thus avoid undue delays. We believe that this power increase will serve the public interest by enabling Class A stations to provide better service to their listeners and by expanding the potential audience for Class A stations (many of which provide specialized programming).

BACKGROUND

3. On July 20, 1988, we initiated this proceeding by adopting a *Notice of Proposed Rule Making* ("*Notice*")[1] setting forth two major technical rule making proposals, both intended to permit improvements in the facilities of the majority of Class A FM broadcast stations in the United States.[2] Specifically, we proposed the creation of a new intermediate class of FM broadcast stations (Class C3), and a general increase in the maximum permitted effective radiated power (ERP) for Class A FM broadcast stations, from 3000 to 6000 watts.

4. In response to the *Notice*, we received 98 formal comments, 16 reply comments, and several hundred informal letters and inquiries.[3] The proposal to create a new intermediate FM station classification (Class C3) received virtually unanimous support from commenting parties. The proposal to increase the maximum permitted transmitting power for Class A FM broadcast stations is also generally supported by the commenters. However, broadcast station licensees remain sharply divided as to whether all Class A stations, or only those able to meet increased distance separation requirements, should be allowed to increase power.

5. On March 30, 1989, we adopted a *First Report and Order* ("*First Report*")[4] amending our rules to provide for the new Class C3 FM broadcast station class. In our *First Report*, we found that the addition of this new class to our FM allotment and assignment system would indeed further the public interest. We indicated then that we would consider the matter of the Class A power increase separately.

SUMMARY OF COMMENTS

6. *Benefit of Increased Class A Transmitting Power*. We tentatively concluded in the *Notice* that a modest increase in the maximum permitted Class A transmitting power would result in a net increase in service to the listening public, and that expansion of the potential audience of Class A stations would likely enhance beneficial competition and program diversity in the FM service.[5] Noting that many Class A stations now compete directly with larger Class B1, B, C2, C1, and C FM stations in the same communities, we stated our belief that the proposed power increase could potentially offset some of the technical disadvantages currently faced by Class A stations.[6]

7. We also stated that, in view of the very important contribution made by Class A stations through their service to smaller or specialized programming audiences, allowing these licensees to improve their technical facilities would enable them to better serve the public.[7] In this connection, we noted that increased power offers two distinct benefits:

> 1) The stations' existing audiences would receive a stronger, and therefore more reliable signal.
>
> 2) A usable signal would be extended into new areas and thereby offer an additional choice to the radio audience in those areas.[8]

8. Most of the commenters agreed with our assessment of the benefits of increased power for Class A FM stations. Additionally, the vast majority of comments submitted by licensees of Class A stations related specific coverage problems experienced by their particular stations which they believe the proposed power increase would help to solve. These problems generally fall into the categories of terrain shielding and obstruction shadowing, temperature inversions and other propagation vagaries, building penetration difficulty, and signal domination[9] by larger class FM stations.

9. Agreeing with our contention that the Class A power increase would enhance beneficial competition, James J. Ganley of Class A station WWWY in Columbus, Indiana observes that "in many markets such as ours there is a local competing Class B FM station also licensed to the same city. While we both provide service to the same immediate area and we both pay similar competitive salaries for air talent, sales, office and engineering help - they have over sixteen times as much power as we do." However, one commenter disagrees with the argument that FM stations operating with current Class A facilities can not compete with larger FM stations. Greater Media, Inc. ("Greater Media"), which owns 5 Class B FM stations and 2 Class A FM stations, including Class A station WMGQ in New Brunswick, New Jersey, states that its successful station WMGQ competes directly with numerous high-power stations in the highly competitive Trenton-New York corridor.[10] In reply to this example, the New Jersey Class A Broadcasters Association ("New Jersey") points out that WMGQ serves a densely populated area with almost 1 million people within its 1 mV/m contour, thus implying that it is not a typical Class A station.[11]

10. Some of the commenters state that a power increase is needed to enable Class A stations to provide service to areas where population growth or movement has occurred. Buckley Broadcasting Corporation ("Buckley") owns 14 radio stations - 5 AM stations and 9 FM stations, of which 2 are Class A FM stations (WYNZ, Westbrook, Maine and KGIL, San Fernando, California). Buckley states that its Class A stations are no longer able to cover their communities of license because of the growth these communities have experienced, both in population and land area. A similar argument is made by Barry Broadcasting Company ("Barry"), which operates WBCH-FM in Hastings, Michigan. According to Barry, local business in Hastings has gravitated towards Grand Rapids, and as a result, Barry has become dependent on the Grand Rapids market and the commuting audience which travels daily between the two communities. Barry indicates that the proposed power increase would greatly assist it in serving the needs of that audience. Barry and Drexel Hill Associates, Inc. ("Drexel"), licensee of Class A stations WDHA (Dover, New Jersey) and WIIS (Key West, Florida), both assert that a power increase would assist in overcoming interference from ignition noise and propagation effects such as "dead spots" and "picket fencing."[12]

11. Other commenters suggest that the power increase will help their stations overcome terrain related coverage problems. For example, Pulaski Broadcasting, Inc., licensee of Class A FM station WINJ (Pulaski, Tennessee), states that its current facilities are inadequate because of hilly terrain and that the additional power would allow WINJ to add coverage to a nearby small community, Ardmore. Another Class A station licensee, Brattleboro Broadcasters, Inc. ("Brattleboro"), (WKVT-FM, Brattleboro, Vermont) cites wide variations in average terrain as a major problem it faces, adding that its measured 1 mV/m contour does not meet projections. Brattleboro states that it provides service with a local focus and that the power increase proposed would improve its ability to deliver this service.

12. Dickerson Broadcasting, Inc. licensee of Class A station WEAG, in Stauke, Florida, claims that it experiences interference from distant stations during temperature inversions throughout much of the year, and that the power increase would counteract this problem in most cases. Another commenter, Nutmeg Broadcasting Company ("Nutmeg"), licensee of Class A station WILI in Willimantic, Connecticut, claims that it receives interference as close as 7 miles from its antenna tower from a first adjacent New Bedford, Massachusetts Class B station approximately 70 miles away. Nutmeg alleges that the signal from this Class B station can overpower its signal even within its predicted 3.16 mV/m (70 dBu) contour. Nutmeg states that the power boost proposed would allow WILI to fill in some weak areas within its predicted 70 dBu contour, and extend 60 dBu coverage to the village of Stafford Springs, Connecticut.[13] Nutmeg notes that it is not technically feasible to add new stations in Connecticut and therefore any additional radio service must come from existing stations. Roger P. Pasquier, President of KOCN, a Class A FM station in Pacific Grove, California, comments that severe temperature inversions occur along the coastline of that state, which, combined with terrain blockage, "shut down" KOCN's signal during certain seasons of the year. Pasquier believes that the proposed power increase would help to offset this problem.

13. Hanson Communications, Inc. ("Hanson"), licensee of Class A FM station WGMX in Norwalk, Connecticut, cites problems with building penetration, shadowing, and temperature inversions. Hanson states that a power increase to 6000 watts would be meaningful and helpful to WGMX in dealing with these problems, and would result in improved reception within its primary service area. Albany Broadcasting, Inc. ("ABI"), which operates WQBK-FM in Rensselaer, New York, says that some of its long-time listeners have complained that they can no longer receive a clear signal from WQBK-FM. ABI suggests that this is due to shadowing caused by the construction of large buildings, and that a power increase will help to restore service to these listeners. The Jet Broadcasting Company, Inc. ("Jet"), licensee of Class A station WJET in Erie, Pennsylvania, operates with a relatively large antenna height above average terrain (204 meters) to avoid terrain shadowing problems in the southern part of its Erie market. However, the power reduction required for operation with this height causes substantial difficulties with penetration of concrete and steel buildings, according to Jet. The power increase would improve thus improve in-building reception of WJET.

14. The Massachusetts Class A Broadcasters Association ("Massachusetts") summarizes the need for increased Class A power:

> " . . . Class A stations here have matured as a rural but increasingly suburban medium. Population growth has . . . (filled) the open tracts of virtually every small town with housing developments. Where once our listeners were concentrated geographically in a core community, now they are dispersed throughout the . . . countryside. Twenty years ago many residents worked where they lived. Today they commute miles to offices in Boston, Worcester, Springfield . . . . A twenty mile commute to 'shop the mall' is a common journey. These demographic changes are . . . an intrinsic part of regional growth . . . . But they spell distress and perhaps disaster for Class A broadcasters who remain constrained by technical regulations invented in a world 26 years past . . . . Our listeners are leaving us. Generally, they don't go far. A 30 mile commute to work . . . a new home in a town 10 or

15 miles distant. But they can't take us with them because they can't hear us. Coverage which was good enough 20 years ago will no longer suffice."[14]

15. *Class A Maximum Facilities.* In the *Notice*, we proposed to increase the maximum permitted ERP for Class A FM broadcast stations from 3000 to 6000 watts, while leaving the reference antenna height above average terrain at 100 meters (328 feet).[15] This combination produces a class contour distance[16] of 28 kilometers (18 miles). However, we invited comments as to whether a different maximum ERP limit (e.g. 5000 watts) or a different maximum ERP and reference HAAT combination (e.g. 4000 watts and 125 meters) would be more appropriate.[17]

16. Very few commenters addressed this issue, and those that did supported the proposed 6000 watt, 100 meter combination. The Association of Federal Communications Consulting Engineers ("AFCCE") states that the proposed maximum power and reference antenna height above average terrain appear to be appropriate to accomplish the objectives of upgrading Class A facilities.[18] Nutmeg comments that no maximum effective radiated power less than 6000 watts would provide satisfactory relief for Class A stations. However, New Jersey, emphasizing its position in favor of a blanket power increase, indicated that it would prefer an across-the-board power increase even if of a lesser magnitude, rather than a selective power increase of 6000 watts.[19]

17. *Methods of Implementation.* We outlined in the *Notice* two possible methods (which we termed "METHOD 1" and "METHOD 2") for implementing the Class A power increase, and requested further public comment addressing the advantages and drawbacks of each method.[20] Under METHOD 1, we would raise the maximum ERP limit for all Class A FM stations from 3000 to 6000 watts, while retaining the existing minimum co-channel and adjacent channel spacings applicable to Class A stations.[21] Grandfathered short-spaced stations[22] would be allowed to increase ERP up to 6000 watts, subject to the provisions of Section 73.213 of the rules. Referring to an initial staff study[23], we noted that employing METHOD 1 would apparently have little effect on other existing stations, and would result in a net service area gain. But we stated that further study of the technical implications of METHOD 1 would be undertaken during the pendency of this proceeding.[24]

18. METHOD 2 would permit the increase in power for only those Class A stations able to meet appropriate new separation distances.[25] Service gains would not be as great as with METHOD 1, but adverse effects on existing stations would be minimized. We stated that METHOD 2 would essentially create two categories of Class A FM stations - those allowed to increase power to 6000 watts, and those remaining limited to 3000 watts. Grandfathered short-spaced stations would fall into the latter category; however, some of these stations might be able to increase power if mutual agreements could be reached with all involved stations, and if it were shown that such an increase would serve the public interest.

19. If METHOD 2 were to be implemented, two sets of distance separation requirements could be established - one for the 3000 watt level and another for the 6000 watt level - or, alternatively a single set of distances based on the higher power level could be used. We requested comment on these possibilities and on the complexity involved with administering METHOD 2 generally.[26]

20. In general, comments of most Class A FM broadcast station licensees favor a "blanket" power increase; that is, they request that the Commission allow *all* Class A stations to increase power without regard to the individual situations of the stations. Accordingly, between the two methods we proposed, most Class A licensees prefer METHOD 1, which is closer to the blanket upgrade approach. These licensees oppose a selective upgrade approach, such as METHOD 2, based on increased distance separation requirements. Some of the reasons cited by these commenters in support of the blanket upgrade are:

1) The blanket approach would allow all Class A stations to increase power, whereas the selective approach would exclude many Class A stations, particularly in the urban northeast, where the competitive imbalance is most severe.

2) The blanket approach would be relatively simple to administer, whereas the selective approach would involve additional paperwork and delay associated with a case-by-case implementation.

3) Under the blanket approach, all Class A stations would be on an equal footing, whereas under the selective approach, there would be two categories of Class A station, 3000 watt and 6000 watt.

4) Under the blanket approach, all Class A stations could increase power at their current locations, whereas under the selective approach, costly relocations could be necessary in order for some Class A stations to increase power.

21. New Jersey, for example, reports that 21.7% of all Class A stations are short-spaced under the current distance separation requirements, 46.3% would be short-spaced under the increased minimum distance separation requirements suggested by the National Association of Broadcasters ("NAB"), and 55.8% would be short-spaced under the increased minimum distance separation requirements set forth by the Association for Broadcast Engineering Standards ("ABES").[27] Under METHOD 2, power increases would not be allowed for short-spaced stations. Although under METHOD 1, power increases would be allowed for short-spaced stations, such increases would be subject to Section 73.213 of the rules, and thus would likely involve relocation of the station's transmitting antenna to a new site or the use of a directional antenna. New Jersey advises that such measures would be unaffordable or otherwise infeasible for most Class A stations.[28] Main Street Broadcasting Company, Inc. ("Main Street"), licensee of Class A station WLNG (Sag Harbor, New York), asserts that any method which excludes such a large percentage of existing Class A stations from increasing power would be "grossly inequitable."[29]

22. Brattleboro states that it supports the blanket approach because implementation would be less burdensome to the Commission and broadcasters. Brattleboro fears that a selective approach would require a case-by-case study of all Class A stations that could swamp the Commission, and cause Class A stations to incur large expenditures for engineering studies, legal counsel, and FCC filing fees. Furthermore, Brattleboro argues that any method other than a blanket increase would result in undue delays, even for upgrades that present no problems.[30]

23. New Jersey also fears that any implementation method other than an unconditional blanket increase would entail "the creation of two groups of Class A stations -- the haves and the have-nots; those with 6000 watts and those with 3000; those with significantly improved coverage and those with their existing, increasingly inadequate coverage."[31] Drexel agrees, stating its belief that Class A stations remaining at the 3000 watt level would become "a new underclass of third class citizens, who will be worse off than before."[32] Greater Media, however, replies that New Jersey's "haves and have-nots" assertion is "ludicrous." By such logic, Greater Media argues, Class B and C stations should be considered "haves" and Class B1, C1, C2, and C3 stations should be considered "have-nots." The availability for allotment of various classes of FM stations depending on geographical locations and service objectives constitute a carefully crafted plan providing effective and efficient spectrum allocation tools, according to Greater Media.[33]

24. Vacationland Broadcasting Services ("Vacationland"), licensee of Class A station WHYR (Saco, Maine), details the complications it will face to increase power if a blanket increase method is not adopted. Vacationland states that it would need to relocate its transmitting tower to overcome a 5.6 km short-spacing under the ABES suggested requirements (2.6 km under the NAB suggested requirements). Vacationland points out that its existing tower will remain in place because other radio services also use it and that the new tower will thus become an additional potential aviation obstruction and environmental hazard. Vacationland further alleges that the resources it would spend to purchase land and equipment for the relocation might otherwise be spent improving community service.[34]

25. Universal Broadcasting Corporation ("Universal"), licensee of four Class A FM stations, states that the Commission's proposal to increase power of Class A FM stations to 6,000 watts is consistent with previously stated public interest goals of improving the quality of existing broadcast service to the public, and that METHOD 1 provides the greatest possible realization of those goals with little, if any, increased interference to existing facilities. Therefore, Universal urges the Commission to provide for an across-the-board increase in the maximum power of Class A FM stations.[35]

26. On the other hand, comments filed by many broadcast organizations, consulting engineering firms, and most licensees of Class B FM stations strongly oppose any form of blanket power increase for Class A stations. These commenters state that they favor increased power for Class A stations, but only where no interference would result, and therefore they believe that any Class A power increase must be administered on a selective basis. These commenters therefore favor METHOD 2. The principal reasons given by these commenters for their opposition to a blanket Class A power increase are:

> 1) A blanket power increase for Class A stations would cause unacceptable interference to the current service of Class B and B1 stations, whereas a selective power increase would protect this service.
>
> 2) A blanket power increase would cause overall degradation of the FM service.
>
> 3) A blanket power increase would destroy the technical integrity of the minimum distance separation requirements.

27. For example, ABES states that an across-the-board increase in maximum Class A power cannot be accomplished without what ABES considers to be an unacceptable level of interference to existing FM service.[36] Greater Media agrees, commenting that METHOD 1 would cause "massive new interference throughout the FM band, affecting most classes of FM stations, including in particular Class B facilities." Greater Media adds:

> "Method One is also grossly unfair to existing licensees which have served the public interest for years. It unilaterally expropriates portions of their currently protected service areas for the benefit of Class A licensees, which have operated their facilities with full knowledge of their advantages and disadvantages."[37]

28. Many of the commenters, in gauging the effect of a blanket Class A power increase, make differing assumptions as to the area within which Class B FM stations are entitled to protection from interference from other FM stations. Greater Media's assessment of the extent of loss of protected service is based upon its use of the 0.5 mV/m field strength contour as the boundary for Class B protected service.[38] Greater Media claims that the Commission, in Docket 14185 which produced the fundamental rules that govern the FM service today, "wisely opted for protection of the Class B signal to the 0.5 mV/m (54 dBu) contour" while adopting a 1 mV/m (60 dBu) protected field strength contour for Class A and Class C stations.[39] However, Massachusetts, in reply, contradicts this claim, stating that "there is no historical or scientific evidence that the Commission formulated the spacing rules with an intent to protect Class B stations to any particular contour." As an example, Massachusetts states that the original spacings protected Class B service from second adjacent channel interference only within the 1.35 mV/m (62.5 dBu) contour.[40]

29. Vacationland asserts that "the real issue is whether Class B stations should be protected" to their 0.5 mV/m field strength contour, or to their 1 mV/m contour, "as [are] all other stations."[41] Massachusetts argues that "even if a 54 dBu protected contour did have historical credibility it would still have to pass the public interest test" now, "and it could not."[42] Likewise, New Jersey, noting that for the past quarter century Class B stations have not enjoyed this level of protection from adjacent channel signals, asserts that "the public interest is not served by protecting distant 54 dBu coverage from Class Bs at the expense of stronger, more reliable signals from local Class As."[43] New Jersey suggests that Class B stations should be provided protection to the same field strength contour as for Class A and C stations.[44] Greater Media replies:

> "Contrary to [New Jersey's] claim, Class B stations are now and have always been entitled to protection to the 54 dBu contour. This principle . . . should not be overturned here simply to provide one group of licensees a marginal benefit at the expense of another group. Thus, [New Jersey's] use of a 58 dBu or 60 dBu contour for Class B stations in an at-

tempt to show lack of impact is a rewriting of current FM allocation standards which may not be relied upon by the Commission in judging the effect of blanket increases for Class A stations on existing Class B FM facilities."[45]

30. ABES notes that the Commission's proposal does not consider the possible loss of generally useful service outside the protected contour.[46] Concern about potential interference to non-protected service is also expressed by CBS, Inc. ("CBS"), which notes that various adjacent channel Class A stations are located within the 50 uV/m contours of its Class B FM stations KNX-FM (Los Angeles) and KRQR (San Francisco).[47]

31. NAB comments that carefully established technical standards and related mileage separations are needed to ensure that only limited additional interference will occur to existing service, including the existing service of Class A broadcasters themselves.[48] Increasing power without regard to technical standards (as with an universal blanket power increase) sets a poor public interest precedent, says NAB. NAB further explains that "the existence of technical standards serves the public's interest by assuring the public of interference-free reception. If the Commission were to disregard the standards it has itself established, one must question the basis for having any technical standards at all."[49] Main Street, however, describes this argument as a "red herring." Main Street finds absurd the suggestion that METHOD 1 would "somehow undermine the integrity of the FCC's entire technical scheme."[50]

32. Stoner Broadcasting System, Inc. ("Stoner") asserts that logical errors in the arguments made by those advocating adoption of METHOD 1 are symptomatic of the broader policy problems which flaw the proposal. According to Stoner, METHOD 1 represents the same sort of incremental degradation that (Stoner claims) has played a major part in the decline of AM service. Stoner believes that the Commission would be ill-advised to send the now vibrant and healthy FM service on the same course by chipping away at the quality of FM service. Instead, Stoner suggests that the Commission should allow upgrades of Class A stations only where doing so would not cause interference to existing service. Stoner believes that the selective approach of METHOD 2 would permit an improvement in service for a substantial number of Class A FM stations without degrading the quality of the service of other FM stations, thus protecting the integrity and quality of FM service as a whole.[51]

33. Kiss Limited Partnership ("KLP"), a licensee of six Class B FM stations, stated that it is not opposed to an increase in Class A power provided that FM service areas are protected from adjacent and co-channel interference. KLP is, however, opposed to METHOD 1 because it believes that under this method existing stations would be subject to increased adjacent and co-channel interference. KLP asserts that the Commission has failed to show that the loss of established service and the disruption of listening habits, if METHOD 1 were adopted, is outweighed by any substantial increased public benefits. KLP further submits that the Commission has not provided any empirical evidence that Class B and C stations do not serve local audience needs at least as well as Class A stations in the same community.[52]

34. The engineering firm of du Treil, Lundin & Rackley ("dLR") favors METHOD 2 and suggests (as does NAB) that it would not be necessary to create two types of Class A station. Stations unable to meet the "test" of increased distance separation requirements could be "grandfathered," and even these stations might be allowed to increase power pursuant to "site relocation, the employment of directional antenna, agreement between parties, or other acceptable means." dLR adds that a public interest showing should not be required for the approval of an agreement between a 6000 watt Class A station and a short-spaced Class B station, because "the projected area of interference is likely to be small and well served by other stations."[53]

35. *Administrative procedures.* We stated in the *Notice* that regardless of which method for implementing a Class A power increase were to be selected, we would prefer to minimize the administrative burdens on licensees and our staff. While noting that we generally proceed upon individual applications in upgrading FM facilities, we expressed concern that employment of a strictly case-by-case approach would result in excessive processing delays, even for problem-free applications. Nevertheless, we requested comments on the procedural aspects and implications of a case-by-case approach.[54]

36. We proposed, however, to employ procedures combining elements of both the blanket approach and the case-by-case approach. Specifically, we proposed to allow (with certain exceptions[55]) Class A stations that can effect the power increase by simply adjusting transmitter output power, replacing an omnidirectional antenna with a higher gain omnidirectional antenna, replacing the transmission line or components within the transmission line, or by a combination of these methods, to do so without individual prior approval. In such cases, the station licensee would be required only to file FCC Form 302, together with a supplemental exhibit addressing environmental and coordination matters, within ten days after the power increase is made.[56] In all other cases, the Class A station licensee would be required to file FCC Form 301 and obtain prior approval for the power increase.[57] We invited suggestions for any additional rule changes that might be needed to administer the proposed power increase.[58]

37. ABES opposes this procedure because it believes the Commission must have the opportunity to pass on the "propriety and manner in which a station proposes to increase power." ABES believes that the Commission should determine, prior to allowing Class A stations to increase power, whether minimum spacing requirements are met.[59] ABES argues that if an ineligible station were to increase power, it would be necessary for the Commission to catch the error when processing the station's application for modification of license, notify the station of the error, and then require the station to reduce power. In view of expenses stations may incur to increase power, ABES concludes that potential financial hardships on stations would be avoided by requiring Class A stations to file Form 301 and obtain Commission approval prior to any power increase. ABES believes the processing burden on the Commission's staff would be minimal because compliance with minimum distance separation requirements can be readily determined using computer programs. ABES therefore urges the Commission to require Class A FM stations wishing to increase power to file FCC Form 301 prior to implementing the change.[60]

38. *Effect on public radio service.* If bilateral increased separation requirements (such as contemplated for METHOD 2) were employed in connection with the Class

A power increase, these increased requirements might adversely affect future expansion possibilities for public radio stations operating on the top three channels of the reserved band.[61] We requested comments as to whether and how our existing policy in regard to public radio service should be modified to prevent such adverse affects.[62]

39. National Public Radio and the Corporation for Public Broadcasting ("NPR&CPB"), in joint comments, state that neither of the two proposed methods for implementing the Class A power increase takes into account special burdens that the power increase might create for upper reserved-band non-commercial educational FM (NCE-FM) stations. NPR&CPB state that although current Commission policy provides some accommodation for upper band NCE-FM stations in the vicinity of a Channel 6 TV station, such policy does not ensure that public broadcasters can retain full use of their existing spectrum if Class A station power is raised. NPR&CPB further believe that public radio stations in locations which do not have a Channel 6 TV station will also experience some restriction on future expansion.[63]

40. NPR&CPB submit that the current "heavy burden" policy with regard to NCE-FM stations in a TV Channel 6 market would be completely overcome by the proposed METHOD 1.[64] In addition, they assert that METHOD 2 also fails to take into account the Commission's stated policy on maintaining reserved spectrum for public broadcasting, because it does not propose any special showing for Class A stations seeking a power increase in areas where a Channel 6 TV station operates. Concerning the proposed administrative provisions that would allow licensees of certain Class A stations to implement the power increase without individual prior approval, NPR&CPB suggest that, at a minimum, the Commission should require such licensees to notify affected NCE-FM stations prior to increasing power, and in markets where a Channel 6 TV station is assigned, make a showing to rebut the presumption that a Class A power increase on Channels 221, 222 and 223 would have an adverse affect on public radio service in the area.[65] NPR&CPB conclude that the Commission should not adopt an implementation method that favors administrative ease over statutory responsibilities to assess the public interest. NPR&CPB therefore urge the Commission to reject outright the proposal for Class A power increases in light of the significant burdens that could be imposed on noncommercial educational broadcasters.[66]

41. *IF distance separation requirements*. Finally, we invited comments on how to handle any existing IF-related Class A stations that do not meet the increased (from 8 to 10 kilometers) IF spacing requirement that would be needed to maintain a 36 mV/m protection level.[67]

42. Relatively few comments addressed the IF issue. Most of those that did, such as AFCCE, support distance separation requirements designed to prevent, on the average, overlap of the field strength contours which were (at that time) to be determined in MM Docket No. 86-144. For IF-related Class A stations that are currently short-spaced or would become short-spaced as a result of an increase in the IF distance separation requirements, AFCCE urges that power increases for these stations be considered on a case-by-case basis. To avoid prohibited contour overlap, AFCCE suggests that such stations be allowed to employ any reasonable technical means, such as reduced effective antenna height and/or ERP in pertinent directions, including the use of directional antennas.[68]

DISCUSSION

43. *Class A power limit raised to 6000 watts*. During the pendency of this rule making proceeding, we have received several hundred letters from licensees, general managers, and engineers of Class A FM stations in every region of the country. If one fact is abundantly clear from this outpouring, it is that a substantial number of the persons most familiar with the day to day operation of Class A stations firmly believe that the current 3000 watt power level is inadequate for these stations to be technically and economically competitive in the current radio marketplace environment, and that the proposed increase to 6000 watts would make a significant improvement in the ability of these stations to serve the public. For the most part, even the commenting parties that oppose the blanket power increase plan do not question the need of Class A stations for the additional power. In fact, most of these parties state that they support the improvement of Class A facilities, provided that interference is not caused to existing service.

44. We find that the record as a whole supports the proposed increase in the maximum transmitting power for Class A stations. Therefore, we are amending Section 73.211 of our rules to raise the maximum effective radiated power limit for Class A FM broadcast stations from 3000 to 6000 watts, as we proposed. We are retaining the current reference antenna HAAT of 100 meters for Class A stations other than those located in Puerto Rico and the Virgin Islands.[69] Fewer Class A stations would be able to increase facilities if a higher reference antenna HAAT (and correspondingly lower ERP) were adopted, because of the increased costs and necessity to obtain zoning and/or FAA approval for taller antenna structures. No commenters presented arguments that any other ERP-HAAT combination would be more appropriate. Furthermore, equivalent combinations of lower ERP and higher antenna HAAT, such as 4000 watts with 125 meters, will be permitted under the new limit.[70] We do not believe that any useful purpose would be served by our adopting a lesser increase in the power limit, *e.g.* 5000 watts, because if we did so, the benefits of the power increase would be reduced, yet none of the difficulties of its implementation would be resolved.

45. *Increased minimum power requirement for Class B1 and C3*. The minimum power requirement for each FM station class (in Section 73.211 of the rules) corresponds to the maximum power limit for the next lower station class.[71] This helps to avoid ambiguity in station classification. Because we are raising the maximum power limit for Class A, we are also raising the minimum power requirement for Class B1 and C3 stations accordingly. Currently Class B1 and C3 stations must operate with an ERP greater than 3000 watts. We are revising Section 73.211 to require that Class B1 and C3 stations must operate with an ERP greater than 6000 watts.[72] In the non-reserved (commercial) portion of the FM band, all but two of the 53 outstanding Class B1 authorizations already meet the new minimum requirement.[73] In the educational portion of the band, 79 of the 105 stations currently classified as Class B1 would continue to be properly classified under the new rules. There are no

Class C3 stations yet, as this station class was established only a short time ago in the *First Report*. We did not propose the reclassification of existing Class B1 authorizations in the *Notice*, therefore, we are not establishing reclassification procedures for them at this time.

46. *Selective implementation method chosen*. After careful review of the record, in particular the engineering statements and other comments that support or oppose, on technical grounds, each of the proposed methods, we conclude that the Class A power increase should be implemented on a selective basis, rather than as a blanket increase. We further conclude that the minimum distance separation requirements applicable to Class A stations should be adjusted to account for the increase in transmitting power. The rules that we are adopting are thus similar to our proposed METHOD 2, however, they also incorporate some aspects of our proposed METHOD 1. For example, the new rules provide for increased power operation by existing grandfathered short-spaced stations, subject to Section 73.213 of our rules.[74] In addition, we are adopting rules that will allow the licensees of fully-spaced Class A stations that can effect the power increase by simple technical means to do so prior to filing an application. These measures are explained further below.

47. The service areas of FM stations in the non-reserved band are considered to be circles of a given radius.[75] The minimum distance separation requirements are intended to protect, on average, service[76] within these circular areas, assuming that all stations broadcast using maximum permitted ERP and an antenna HAAT equal to the reference HAAT for their station class. However, in any individual situation, due to terrain variations and other factors, this protection might not be realized. Furthermore, certain of the required minimum distances are not calculated precisely using current propagation techniques, and are thus less accurate than is desirable. As a consequence of these "anomalies," full protection may not be realized. Nevertheless, our rules state clearly that each individual station is entitled only to such protection to its service as may result when assignments are made in accordance with the rules.

48. *Effect of a blanket increase on existing service*. In the *Notice*, we considered METHOD 1 because our initial analysis indicated that the adverse effect of a Class A power increase on existing stations would be relatively small compared to the increased service to the public. As noted above, many of the commenters take issue with this assessment, variously describing a blanket Class A power increase as an action that would cause "massive interference"[77] and ruin the "technical integrity" of the FM service[78], and would eventually visit upon FM many of the ills suffered by the AM broadcast service.[79]

49. A blanket power increase might result in some interference to the service of the larger class stations. The Commission originally established that Class B stations should have a protected service radius of 40 miles. Because we believe that, in view of the size of urban and suburban areas served today, this expected service radius should not be reduced[80], and because we wish to act very cautiously in taking action that might shift equities substantially, we conclude that the public interest would not be served by imposing an involuntary coverage reduction on Class B stations. Moreover, we note that Class A facilities were acquired with a 3 kW limitation. While a selective increase in power is consistent with the public interest, it should not be accomplished at the expense of reducing coverage or interfering with other existing facilities. Consequently, we shall employ a selective method to allow existing Class A stations to increase power.

50. *New minimum distance separation requirements for Class A stations*. The purpose of our minimum distance separation requirements for FM stations is to allow FM assignments to be made without excessive delay on an administratively convenient "go - no go" basis.[81] As previously explained, FM stations are entitled only to such coverage protection as the separation requirements provide. Consequently, if the maximum power limit for Class A stations is to be raised and involuntary loss of currently protected service area is to be prevented, it follows that the distance separation requirements applicable to Class A stations must be increased. We are adopting new requirements that will maintain present protection.

51. *Grandfathered short - spaced stations*. We have decided, as suggested by dLR and NAB, to grandfather all existing stations that do not meet the new distance separation requirements.[82] A new category of grandfathered short-spaced stations under Section 73.213 of our rules, comprising these stations, will be created. For stations in this new category, we will allow (1) Class A stations broadcasting with no more than the current maximum facilities (3000 watts ERP and an antenna HAAT of 100 meters, or equivalent lower ERP and higher HAAT) and newly short-spaced stations of all other classes, and (2) Class A stations operating with more than 3000 watts ERP, but with no greater interference potential than a station operating at the current maximum facilities[83] to be modified or relocated provided that the current minimum distance separation requirements are met.[84] The first provision preserves the freedom to modify or relocate, under the terms of the current rules, the newly-grandfathered Class A stations that do not increase power above the current limit and the stations of other classes that become short-spaced to Class A stations as a result of our revision of Section 73.207 of the rules in this order. The second provision allows licensees of newly-grandfathered Class A stations using an antenna HAAT less than 100 meters the option to increase power above 3000 watts.[85] Although a power increase under these circumstances will not expand service area beyond that of a 3000 watt, 100 meter Class A station, it may still prove to be of some value in overcoming the building penetration and temperature inversion interference problems frequently cited by commenters. Stations that were already grandfathered short-spaced stations before this action can still be modified or relocated subject to the existing provisions of Section 73.213.[86]

52. We recognize that there may be situations where the newly created short-spaced Class A facilities may be able to increase power without reducing another station's coverage. In this regard, we wish to extend authority to increase power where possible, so long as it does not interfere with other stations. Therefore, we will consider applications by newly created short-spaced Class A stations, on a case-by-case basis, in the following limited circumstances. In the case of Class A stations which are newly short-spaced to each other and which seek mutual increases in facilities we will allow such increases in power to the class limit provided that all the Class A stations seeking the increase first obtain the consent of any other stations who may be affected by the change, and that the increase is otherwise consistent with the public interest. Unilateral increases will be permitted if a station has obtained the consent of all other stations which may

be affected, and the increase is consistent with the public interest. We note that agreement among stations which may be affected is a necessary but not sufficient condition to granting a power increase. As between Class A and other facilities, the Commission will examine each request to insure that no fully spaced or less short spaced site is available.

53. *IF distance separation requirements.* Because IF interference may potentially affect all of the FM stations in an area, in addition to the two IF-related stations, we will not allow agreements for short-spaced IF related stations. To increase power beyond the current 3000 watt, 100 meter maximum facilities, a Class A station's antenna site must meet the modified IF distance separation requirements of Section 73.207.

54. *Public radio service.* We believe that any adverse effect of the Class A power increase on public radio service operating in the upper portion of the reserved spectrum will be minimal under the rules we are adopting. Our findings are based on the following reasons. First, we note that for second and third adjacent channel stations the distance separation requirements are increased only for the Class A to Class A and Class A to Class C1 relations.[87] The other second and third adjacent requirements are unchanged. The IF distance separation requirements are increased slightly (by 1 to 2 km typically), but some of these requirements were recently reduced in MM Docket No. 86-144, and the two changes offset each other to some extent. Moreover, there are very few IF-related station pairs anyway. Consequently, the only significant increases affecting the upper portion of the reserved band[88] are in the first adjacent minimum distance separation requirements.

55. Second, for those stations that are affected, the commercial Class A station is limited to the current 3000 watt, 100 meter maximum facilities or other facilities with no greater interference potential, unless consent is obtained from all affected stations, *including the NCE - FM station (s).* We conclude therefore, that the action we take herein will not have significant adverse impact upon public radio service, and that no special restrictions or requirements in connection with the power increase for Class A stations operating on Channels 221, 222 and 223 are necessary.

56. *Administrative procedures.* Because of our desire to allow as many Class A stations as possible to upgrade without unnecessary delay and expense, we are adopting administrative procedures similar to those proposed in the *Notice.* Specifically, in November of this year, we will publish a list of licensed Class A stations at sites that appear to meet all of the appropriate minimum distance separation requirements in our rules.[89] Of the stations on this list[90], those for which the power increase can be implemented by replacing a non-directional antenna with a higher gain non-directional antenna, changing the transmitter output power[91], changing the type or length of the transmission line, and/or installing or removing certain components in the transmission line, may begin operation with increased ERP on or after December 1, 1989, but prior to the filing of an application for such operation. In such cases, licensees will be required to file FCC Form 302, together with the supplemental exhibit[92] addressing environmental matters (see Appendix B), within 10 days after the power increase is made.[93] This automatic authority does not extend to stations for which an increase in facilities would expose workers or the general public to levels of rf radiation in excess of the "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," (ANSI C95.1-1982) by the Institute of Electrical and Electronics Engineers, Inc., 345 East 47th Street, New York, New York 10017. Such stations may not operate with increased facilities until measures are taken to prevent workers and the general public from being exposed to the excess levels of rf radiation or unless they first receive authorization from the FCC.

57. In all other respects, the rules we are adopting will become effective on October 2, 1989. Applications and petitions filed prior to October 2, 1989 must comply with, and will be processed in accordance with, the current rules. Applications on FCC Form 301 to increase Class A station power pursuant to the rules we are adopting herein (for stations that will be newly grandfathered, or for some other reason will be unable to utilize the FCC Form 302 procedure described above) may be filed on or after October 2, 1989. Because some Class A stations not meeting the new distance separation requirements may nevertheless be able to increase power by utilizing the contour protection provisions of Section 73.215 of our rules, we are exempting such stations from the temporary 5 mile (8 kilometer) limit on short-spaced locations under this rule.

CONCLUSION

58. Whenever we consider major technical proposals that affect the facilities of an entire class of broadcast stations, or the administrative systems governing the allotment and assignment of such, we note that it is virtually impossible to arrive at a solution that will fully satisfy all of those affected. We anticipate that this action granting a general increase in the power of Class A FM broadcast stations will be no exception. No other technical proposal since BC Docket 80-90 has generated so great a controversy or so large a response. We appreciate the many well prepared and informative comments supplied by individual broadcast station licensees, industry organizations, and other concerned parties. In reaching our decisions in this proceeding, we have attempted to fairly weigh the concerns expressed in the contrasting positions and to fashion flexible rules that will provide optimum benefit to the public by encouraging improved FM broadcast service, while maintaining the quality and extent of existing FM service.

59. Finally, we note that we are now approaching the end of a fiscal year in which, as a result of the continuing budgetary need for restraint in federal expenditures, the Commission's resources have been severely strained. We anticipate that our decision in this matter will have a significant administrative impact that could cause a considerable increase in the processing time for FM applications. Nevertheless, we do not believe that we should forgo a good policy decision in this rule making simply because of the administrative costs. Thus, we have set the effective date of this order at the beginning of our next fiscal year. We will endeavor to maintain satisfactory service consistent with the level of resources available in the coming year.

FINAL REGULATORY FLEXIBILITY ANALYSIS

60. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and Purpose of this Action:

The Commission is increasing the maximum permitted power for Class A FM broadcast stations. The principal purpose of this action is to provide additional opportunities for improvement of the facilities of existing Class A FM broadcast stations. The need for such improvement was outlined in the *Notice* and confirmed by the majority of the commenting parties. Existing Class A stations will be allowed to increase to the new power limit on a selective basis.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No commenters addressed the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

The Commission considered the alternative of allowing existing Class A stations, other than grandfathered short-spaced stations, to increase power on an across-the-board basis, rather than a selective basis. However, the Commission determined that to do so could reduce the expected coverage areas of certain other classes of FM broadcast stations, and that to impose such a reduction would not be in the public interest.

61. The Secretary shall send a copy of this *First Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

PAPERWORK REDUCTION

62. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to impose a modified information collection requirement on the public. Implementation of any modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSE

63. IT IS ORDERED, pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303, and effective **October 2, 1989,** That Part 73 of the Commission's Rules is AMENDED as set forth in Appendix A below A, and That authority to order Class A station licensees found to have improperly increased power to return to licensed parameters IS DELEGATED to the Chief, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.207 is amended by revising the numbers in the first seven rows of TABLE A in paragraph (b)(1), by revising the introductory texts of paragraphs (b)(2) and (b)(3), and by revising the numbers in the first row of the table in paragraph (c), to read as follows:

§ 73.207 Minimum distance separation between stations.

* * * * *

(b) * * *

(1) Domestic allotments and assignments must be separated from each other by not less than the distances in Table A which follows:

TABLE A - MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)

Relation	Co-channel	200 kHz	400/600 kHz	10.6/10.8 MHz
A to A	115 (71)	72 (45)	31 (19)	10 (6)
A to B1	143 (89)	96 (60)	48 (30)	12 (7)
A to B	178 (111)	113 (70)	69 (43)	15 (9)
A to C3	142 (88)	89 (55)	42 (26)	12 (7)
A to C2	166 (103)	106 (66)	55 (34)	15 (9)
A to C1	200 (124)	133 (83)	75 (47)	22 (14)
A to C	226 (140)	165 (103)	95 (59)	29 (18)

* * * * *

(2) Under the Canada - United States FM Broadcasting Agreement, domestic U.S. allotments and assignments within 320 kilometers (199 miles) of the common border must be separated from Canadian allotments and assignments by not less than the distances given in Table B, which follows. When applying Table B, U.S. Class C2 allotments and assignments are considered to be Class B; also, U.S. Class C3 allotments and assignments and U.S. Class A assignments operating with more than 3 kW ERP and 100 meters antenna HAAT (or equivalent lower ERP and higher antenna HAAT based on a class contour distance of 24 km) are considered to be Class B1.

* * * * *

(3) Under the Mexico - United States FM Broadcasting Agreement, domestic U.S. allotments and assignments within 320 kilometers (199 miles) of the common border must be separated from Mexican allotments and assignments by not less than the distances given in Table C, which follows. When applying Table C, U.S. Class C2, C3 and B1 allotments and assignments are considered to be Class B; U.S. Class C1 allotments and assignments are considered to be Class C; also, U.S. Class A assignments operating with more than 3 kW ERP and 100 meters antenna HAAT average terrain (or equivalent lower ERP and higher antenna HAAT based on a class contour distance of 24 km) are considered to be Class B.

* * * * *

(c) The distances listed below apply only to allotments and assignments on Channel 253 (98.5 MHz). The Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments where the following minimum distances (between transmitter sites, in kilometers) from any TV Channel 6 allotment or assignment are not met:

MINIMUM DISTANCE SEPARATION FROM TV CHANNEL 6 (82-88 MHz)

FM Class	TV Zone I	TV Zones II & III
A	17	22

* * * * *

3. 47 CFR 73.210 is amended by revising paragraphs (b)(1), (b)(2)(i) and (b)(3)(i) to read as follows:

§ 73.210 Station classes.

* * * * *

(b) * * *

(1) Determine the reference distance of the station using the procedure in paragraph (b)(1)(i) of §73.211. If this distance is less than or equal to 28 km, the station is Class A; otherwise,

(2) * * *

(i) If this distance is greater than 28 km and less than or equal to 39 km, the station is Class B1.

* * * * *

(3) * * *

(i) If this distance is greater than 28 km and less than or equal to 39 km, the station is Class C3.

* * * * *

4. 47 CFR 73.211 is amended by revising paragraphs (a)(1)(ii) and (a)(1)(iv), by revising the numbers in the first row of the table in the introductory text of paragraph (b)(1), by revising paragraph (b)(1)(ii), and by revising the first row in the table in paragraph (b)(3) to read as follows:

§ 73.211 Power and antenna height requirements.

(a) * * *

(ii) The ERP for Class B1 stations must exceed 6 kW.

* * * * *

(iv) The ERP for Class C3 stations must exceed 6 kW.

* * * * *

(b) Maximum limits.

(1) Except for stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below:

Station Class	Maximum ERP	Reference HAAT in meters (ft)	Class contour distance in kilometers
A	6kW (7.8 dBk)	100 (328)	28

* * * * *

(ii) If a station's ERP is equal to the maximum for its class, its antenna HAAT must not exceed the reference HAAT, regardless of the reference distance. For example, a Class A station operating with 6 kW ERP may have an antenna HAAT of 100 meters, but not 101 meters, even though the reference distance is 28 km in both cases.

* * * * *

(3) For stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below:

Station Class	Maximum ERP	Reference HAAT in meters (ft)	Class contour distance in kilometers
A	6kW (7.8 dBk)	240 (787)	42

* * * * *

5. 47 CFR 73.213 is amended by adding a new paragraph (c) to read as follows:

§ 73.213 Grandfathered short-spaced stations.

* * * * *

(c) Stations at locations authorized by grant of applications filed prior to October 2, 1989 that became short-spaced as a result of the revision of §73.207 in the *Second Report and Order* in MM Docket No. 88-375 (_____ FR _____ , _____, 1989) may be modified or relocated in accordance with paragraph (c)(1) or (c)(2) of this section. New stations on channel allotments made by order granting petitions to amend the Table of FM Allotments which were filed prior to October 2, 1989, may be authorized in accordance with paragraph (c)(1) or (c)(2) of this section. No other stations will be authorized pursuant to these paragraphs.

(1) *Applications for authorization under requirements equivalent to those of prior rules.* Each application for authority to operate a Class A station with no more than 3000 watts ERP and 100 meters antenna HAAT (or equivalent lower ERP and higher antenna HAAT based on a class contour distance of 24 km) must specify a transmitter site that meets the minimum distance separation requirements in this paragraph. Each application for authority to operate a Class A station with more than 3000 watts ERP (up to a maximum of 5800 watts), but with an antenna HAAT lower than 100 meters such that the distance to the predicted 0.05 mV/m (34 dBuV/m) F(50,10) field strength contour does not exceed 98 km must specify a transmitter site that meets the minimum distance separation requirements in this paragraph. Each application for authority to operate an FM station of any class other than Class A must specify a transmitter site that meets the minimum distance separation requirements in this paragraph with respect to Class A stations operating pursuant to this paragraph or paragraph (c)(2) of this section, and that meets the minimum distance separation requirements of §73.207 with respect to all other stations.

MINIMUM DISTANCE SEPARATION REQUIREMENTS IN KILOMETERS (MILES)

Relation	Co - channel	200 kHz	400/600 kHz	10.6/10.8 MHz
A to A	105 (65)	64 (40)	27 (17)	8 (5)
A to B1	138 (86)	88 (55)	48 (30)	11 (6)
A to B	163 (101)	105 (65)	69 (43)	14 (9)
A to C3	138 (86)	84 (52)	42 (26)	11 (6)
A to C2	163 (101)	105 (65)	55 (34)	14 (9)
A to C1	196 (122)	129 (80)	74 (46)	21 (13)
A to C	222 (138)	161 (100)	94 (58)	28 (17)

(2) *Applications for authorization of Class A facilities greater than 3000 watts ERP and 100 meters HAAT.* Each application to operate a Class A station with an ERP and HAAT such that the reference distance would exceed 24 kilometers must contain an exhibit demonstrating the consent of the licensee of each co-channel, first, second or third adjacent channel station (for which the requirements of §73.207 are not met) to a grant of that application. Each such application must specify a transmitter site that meets the applicable IF-related channel distance separation requirements of §73.207. Applications that specify a transmitter site which is short-spaced to an FM station other than another Class A station which is seeking a mutual increase in facilities may be granted only if no alternative fully-spaced site or less short-spaced site is available. Licensees of Class A stations seeking mutual increases in facilities need not show that a fully spaced site or less short spaced site is available. Applications submitted pursuant to the provisions of this paragraph may be granted only if such action is consistent with the public interest.

6. 47 CFR 73.215 is amended by removing the NOTE that follows paragraph (b)(2)(ii).

7. 47 CFR 73.610 is amended by revising the first row of numbers in the table in paragraph (f) to read as follows:

§ 73.610 Minimum distance separations between stations.

* * * * *

(f) The distances listed below apply only to allotments and assignments on Channel 6 (82-88 MHz). The Commission will not accept petitions to amend the Table of Allotments, applications for new stations, or applications to change the channel or location of existing assignments where the following minimum distances (between transmitter sites, in kilometers) from any FM Channel 253 allotment or assignment are not met:

MINIMUM DISTANCE SEPARATION FROM FM CHANNEL 253 (98.5 MHz)

FM Class	TV Zone I	TV Zones II & III
A	17	22

* * * * *

8. 47 CFR 73.1690 is amended by revising paragraph (b)(2) and adding a new paragraph (c)(4) and a NOTE following that new paragraph, to read as follows:

§ 73.1690 Modification of transmission systems.

* * * * *

(b) * * *

(2) Change in the operating power from that specified on the station authorization, except as provided in paragraph (c)(4) of this section.

* * * * *

(c) * * *

(4) On or after December 1, 1989, increase in the effective radiated power of eligible Class A FM stations pursuant to MM Docket 88-375, when such increase is effected by:

(i) replacement of a non-directional antenna with another non-directional antenna having higher gain, provided that the height above ground of the center of radiation is within 2 meters of that specified in the station authorization; and/or

(ii) increase in the power input to the antenna, as a result of adjustment of the transmitter output power, change in the type or length of the transmission line, and/or installation of filters or diplexers.

NOTE: Class A stations eligible for a power increase pursuant to paragraph (c)(4) are those which appear on a list issued by the Commission in November 1989.

APPENDIX B

SUPPLEMENTAL EXHIBIT TO FCC FORM 302

Increase in Effective Radiated Power of Class A FM Broadcast Station
Pursuant to 47 CFR 73.1690(c)(4)

1. Would a Commission grant of an application for the increase in effective radiated power specified in this filing constitute an action that may have a significant environmental effect (as defined in 47 CFR 1.1307)?

   Note: Applicants must consider whether the increase in effective radiated power would cause exposure of workers or the general public to levels of radio frequency radiation in excess of the "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," (ANSI C95.1-1982) by the Institute of Electrical and Electronics Engineers, Inc., 345 East 47th Street, New York, NY 10017.

   YES [ ] NO [ ]

2. If you checked YES to question number 1:

   (a) you may not begin operation with increased effective radiated power until you receive Commission approval to do so; and,

   (b) you must submit an Environmental Assessment (47 CFR 1.1311).

   Environmental Assessment Exhibit No. [ ]

3. If you checked NO to question number 1, explain briefly why such a grant would not be an action that may have a significant environmental effect.

CERTIFICATION OF COMPLIANCE

The undersigned licensee of the Class A FM broadcast station for which operation with increased effective radiated power is sought or has begun hereby certifies that such operation is in compliance with all applicable Commission rules and policies, and that, in the event that the Commission finds that such operation is not in compliance with any applicable Commission rule or policy and notifies the licensee of this finding in writing, the licensee will immediately return the station to the power specified in its license.

Licensee (print or type) Title

Signature Date

FOOTNOTES

[1] *See Notice of Proposed Rule Making* in MM Docket 88-375, FCC 88-251, released on September 12, 1988, 3 FCC Rcd 5941 (1988).

[2] The Commission's proposals were based largely upon requests contained in two petitions for rule making: RM-6236, filed on June 16, 1987 by Petaz Communications, Inc., which requested the establishment of an additional intermediate FM station classification in Zone II; and RM-6237, filed on September 1, 1987 by the New Jersey Class A FM Broadcasters Association, which requested that the maximum permitted effective radiated power for Class A FM broadcast stations be increased from 3000 to 6000 watts. Both petitions were listed on Public Notice Report No. 1709, dated January 27, 1988.

[3] A list of parties submitting formal comments, replies, and informal letters appears as Appendix B to the *First Report and Order*, FCC 89-107, 4 FCC Rcd 2792 (1989).

[4] *See First Report and Order* in MM Docket 88-375, FCC 89-107, 4 FCC Rcd 2792 (1989).

[5] *See Notice* at paragraph 17.

[6] *See Notice* at paragraph 18.

[7] *See Notice* at paragraph 19.

[8] *See Notice* at footnote 24.

[9] When an FM signal on a first adjacent channel is sufficiently strong in comparison to the desired FM signal, some FM radios will experience a momentary loss of capture, sometimes described as "bleed through," which is characterized by sporadic bursts of the undesired adjacent channel signal interrupting and disturbing the desired signal. Also under such circumstances, some FM receivers, particularly older ones, will suffer "AFC pulling". This is where the AFC (automatic tuning) circuit in the receiver, which is supposed to keep the receiver "locked on" to the desired signal, becomes overwhelmed by the strong adjacent channel signal and momentarily tunes the receiver to the undesired signal frequency. Both of these phenomena happen most often in mobile receivers and are very annoying to listeners.

[10] Comments of Greater Media at 12, paragraph 17.

[11] Reply comments of New Jersey at 18.

[12] These effects result from overall weak signal strength and multipath interference. Multipath interference is characterized by distortion of the received audio. It is caused by the recombination of two or more portions of an FM signal which, having traveled to the receiving antenna by different paths (perhaps being reflected off of an obstruction), arrive partially or completely out of phase, thus to some degree cancelling each other. "Picket fencing" is a rapid and wide variation in signal strength that generally occurs when a receiver in motion (such as in an automobile) passes through an area subject to multipath interference. "Dead spots" are locations where signal levels are consistently too weak for adequate reception.

[13] According to Nutmeg, Stafford Springs is a small village with 10,000 population that currently has no local daily newspaper and no local radio station.

[14] Comments of Massachusetts at 2 and 3.

[15] In the text of the proposed rules contained in Appendix A to the *Notice*, on page 4 at instruction 4, the Commission proposed that the minimum ERP requirement for Class B1 stations be increased in accordance with Class A maximum ERP. Currently, Class B1 station ERP must exceed 3000 watts. Under the proposed rule, Class B1 ERP would have to exceed 6000 watts. At the same time, the Commission proposed a new Class C3 FM station classification. Under that proposal, Class C3 station ERP would also have to exceed 6000 watts. However, because the maximum power for Class A stations was 3000 watts when the new station Class C3 was established, the rules currently require that Class C3 station ERP must exceed 3000 watts.

[16] The class contour distance is the predicted distance to the 1 mV/m (60 dBu) contour, rounded to the nearest kilometer, for a station transmitting with the maximum effective radiated power (ERP) for its station class and employing an antenna HAAT equal to the reference antenna HAAT for its class specified §73.211 of the rules. The class contour distance is used to calculate the lower ERP required when an antenna HAAT higher than the reference HAAT for the station class is employed.

[17] *See Notice* at paragraph 25.

[18] Comments of AFCCE at 3, paragraph 7.

[19] Comments of New Jersey at 7.

[20] *See Notice* at paragraph 26.

[21] Proposed METHOD 1 incorporates the concept of a "blanket" power increase for Class A FM stations, and to that extent is similar to the action requested by the New Jersey Class A FM Broadcasters Association. The principal difference between METHOD 1 and the method advocated by New Jersey is that the latter envisions *unconditional* power increases for grandfathered short-spaced stations, whereas METHOD 1 would only allow such increases subject to §73.213 of the rules. Despite this difference, some of the commenters refer to METHOD 1 as the "New Jersey plan."

[22] Grandfathered short-spaced stations are (1) stations at locations authorized prior to November 16, 1964 that did not meet the minimum distance requirements on that date and that have remained short-spaced since that date; and (2) stations at locations authorized prior to May 17, 1989, that did not meet the IF separation distances required by §73.207 and have remained short-spaced since that time. *See* §73.213 of the Commission's rules, which defines grandfathered short-spaced stations and sets forth the conditions under which they may be modified or relocated.

[23] This study, entitled "Analysis, using Protected Contour Method, of the Effects of a Power Increase for Class A FM Stations" was attached to the full-text release of the *Notice* as Appendix B.

[24] *See Notice* at paragraph 28.

[25] The idea of allowing a power increase for only those Class A stations that meet increased distance separation requirements originated with the initial comments (to the New Jersey petition for rule making, RM-6237) of two organizations, the National Association of Broadcasters and the Association for Broadcast Engineering Standards. Consequently, some commenters refer to METHOD 2 as the "NAB/ABES plan."

[26] *See Notice* at paragraph 31.

[27] Comments of New Jersey, Engineering Exhibit by Mullaney Engineering, Inc., at 6.

[28] Comments of New Jersey at 4 and 5.

[29] Reply Comments of Main Street at 7.

[30] Comments of Brattleboro at 3.

[31] Comments of New Jersey at 6.

[32] Comments of Drexel at 2 and 3.

[33] Reply Comments of Greater Media at 5.

[34] Comments of Vacationland at 3.

[35] Comments of Universal at 10.

[36] Comments of ABES at 7.

[37] Comments of Greater Media, Summary at i.

[38] In the *Notice*, at Appendix B, the Commission also used the 0.5 mV/m field strength contour to approximate the primary service area of Class B stations. However, the Commission characterized the potential loss of service (less than 2%) to be small. Use of 0.5 mV/m instead of the precise predicted field strength at 40 miles (0.519 mV/m) is more convenient, and the result is essentially the same.

[39] Comments of Greater Media at 16.

[40] Reply Comments of Massachusetts at 3.

[41] Comments of Vacationland at 5.

[42] Reply Comments of Massachusetts at 3.

[43] Reply Comments of New Jersey at 8.

[44] *Id.* at 19-20.

[45] Reply Comments of Greater Media at 6.

[46] Comments of ABES at 7.

[47] Reply Comments of CBS at 3.

[48] Comments of NAB at 6.

[49] Comments of NAB at 9.

[50] Reply Comments of Main Street at 6.

[51] Comments of Stoner at 2, 3.

[52] Comments of KLP at 2-3.

[53] Comments of dLR at 5 and 6.

[54] *See Notice* at paragraph 32.

[55] Under the proposal the following stations would be excluded: stations located near FOB monitoring locations, within the Mexican or Canadian coordination zones, or the "quiet zones," and stations for which the power increase could result in exposure of workers or the public to radio frequency energy in excess of American National Standards Institute guidelines (ANSI C95.1-1982).

[56] FCC Form 302 is used to apply for a new or modified FM station license. It is shorter and less comprehensive than FCC Form 301, which is used to apply for a new or modified non-reserved band FM construction permit. Sections 73.1690 and 73.3544 of the Commission's rules already require that FCC Form 302 be used in situations where a modified FM station license is necessary to reflect changes in a station, but prior approval from the FCC is not required to make the changes.

[57] The power increase would be considered a minor modification regardless of which form were used.

[58] *See Notice* at paragraph 34.

[59] ABES notes that even if METHOD 1 were to be adopted, compliance with intermediate frequency minimum distance separation requirements would still be necessary.

[60] Comments of ABES at 13 and 14.

[61] All current distance separation requirements are bilateral, that is both FM stations must comply with the applicable requirements, even if one of the two stations is a NCE-FM station. Consequently, changes in these requirements may constrain NCE-FM stations from making station modifications that would have previously been permissible.

[62] *See Notice* at paragraph 35.

[63] Comments of NPR&CPB at 5-6.

[64] *Id.* at 6.

[65] *Id.* at 6-7.

[66] *Id.* at 7.

[67] *See Notice* at paragraph 37. *See also Third Report and Order* in MM Docket No. 86-144, FCC 89-62, 54 FR 14961, April 14, 1989. The Commission adopted revisions to the minimum IF channel distance separation requirements based on maintaining a uniform 36 mV/m protection level from IF interference.

[68] Comments of AFCCE at 9, paragraphs 19-20.

[69] In Puerto Rico and the Virgin Islands, the current reference HAAT for Class A stations is 335 meters. The Commission is reducing this to 240 meters in order to maintain the current class contour distance of 42 kilometers. Thus Class A stations in Puerto Rico and the Virgin Islands may increase power but not coverage. (The Commission previously established special ERP-HAAT combinations for FM stations in Puerto Rico (*Fourth Report and Order* in Docket No. 14185, 3 RR 2d 1571) and the Virgin Islands (*Report and Order* in Docket No. 18050, 13 RR 2d 1536) in view of the extreme terrain variations on these islands and other factors.) These stations already have far more predicted coverage than their mainland counterparts.

[70] *See* §73.211(b)(2).

[71] There is no station class lower than Class A. The minimum ERP for Class A is 100 watts.

[72] New minimum power requirements for Classes C3 and B1 were specified in the proposed amendments to §73.211 of the Commissions rules. *See* Appendix A to the *Notice*, page 4, instruction 4.

[73] Of the two stations that operate with less than the new minimum, WNNJ and KRLT, each has special circumstances which necessitate operation with the facilities authorized.

[74] Existing grandfathered short-spaced stations may be modified or relocated, provided that their predicted 1 mV/m F(50,50) field strength contour is not extended toward the predicted 1 mV/m F(50,50) field strength contour of the other station(s) to which the grandfathered short spacing applies. Consequently, grandfathered short-spaced stations will most likely have to relocate, reduce antenna height, and/or employ a directional antenna in order to increase power.

[75] The service area for the average non-reserved band FM station broadcasting with maximum effective radiated power for its station class and an antenna height above average terrain equal to the reference HAAT for its station class is a circle with a radius as follows:

Station Class	Service Radius
A	24.1 kilometers (15 miles)
B1	45 kilometers
B	64.4 kilometers (40 miles)
C3	39 kilometers
C2	52 kilometers
C1	72 kilometers
C	91.7 kilometers (57 miles)

Terrain is assumed to be uniform in all directions. The radii for the original station classes (A, B and C) were specified in miles. The radius for Class C was originally 65 miles, but this later became 57 miles as a result of revision of the propagation curves. Those for the newer classes established in BC Docket No. 80-90 and for Class C3, which was established in the *First Report*, were specified in kilometers, in accordance with the Commission's policy to use metric units. The Commission is increasing the Class A service radius from 15 miles (24.1 kilometers) to 28 kilometers in this decision.

[76] By protecting service, the Commission means that FM stations are assigned in such a way that, on the average, within the protected service area of each station, the signals of other FM stations are too weak to degrade reception of the protected signal below a certain minimum audio signal quality. This actual signal quality is affected by many factors, such as whether the desired FM signal is stereophonic or monophonic, whether or not it has subcarriers, and whether the surrounding environment is urban, suburban, or rural. The audio signal quality

translates into radio frequency signal protection ratios, which in turn underlie technical assignment rules and policy. The standards currently used were re-examined and affirmed in BC Docket 80-90, and are not being reconsidered here.

[77] Comments of Greater Media at 7, paragraph 9.

[78] Comments of NAB at 5 and 9.

[79] Comments of Bonneville International Corporation at 3, Westinghouse Broadcasting Company, Inc. at 2, Great American Television and Radio Company, Inc. at 1 and 2, Fuller-Jeffrey Broadcasting at 5, paragraph 7.

[80] *See Report and Order* in BC Docket No. 80-90, FCC 83-259, 94 FCC 2d 152 (1983), at paragraph 62. The Commission considered the possibility of reducing the Class B service radius from 40 to 33 miles in order to create opportunities for additional new stations, but declined to do so, because the number of potential new stations was too small to justify the loss of existing primary service area.

[81] The term "go - no go" means that assignments are made in accordance with fixed, readily determined criteria (*e. g.* separation requirements), such that applicants and the Commission can expeditiously determine whether an individual application can be granted or must be denied. *See First Report and Order* in Docket No. 14185, FCC 62-866, 40 FCC 666 (1970) at paragraph 9.

[82] Comments of NAB at 3, last paragraph.

[83] The Commission will consider any Class A station for which the distance to the predicted 34 dBu F(50,10) field strength contour does not exceed 98 kilometers to have no more interference potential than a Class A station operating at the current 3000 Watt, 100 meter maximum facilities. Some examples of acceptable ERP - HAAT combinations under this provision are as follows:

ANTENNA HAAT	ERP
30.5 meters (100 feet)	5800 watts
45.7 meters (150 feet)	5000 watts
61.0 meters (200 feet)	4300 watts
76.2 meters (250 feet)	3700 watts
91.4 meters (300 feet)	3200 watts

[84] The Commission is reducing two of the current minimum distance separation requirements: Class A to Class C, first adjacent and second/third adjacent channels, from 169 and 105 kilometers to 165 and 95 kilometers, respectively. The current requirements are larger than necessary to provide full protection (they are two of the anomalies in the table of minimum separation distance requirements). Furthermore, the Commission recently adopted a Class C3 to Class C second/third adjacent requirement of 96 kilometers, and it is illogical for the Class A requirement to be more stringent than the Class C3 requirement.

[85] In such a case, field strength would be increased even though range (coverage) and interference potential would not exceed that of a 3000 watt, 100 meter Class A station.

[86] These prior grandfathered short-spaced stations can be modified or relocated provided that the predicted 1 mV/m F(50,50) field strength contour is not extended toward the 1 mV/m contour of any other short-spaced station. Simultaneous facilities increases may be permitted, up to the limits in §73.211 (including the new 6000 watt Class A power limit), pursuant to agreements among the stations and a showing that such increases are in the public interest. *See* §73.213 and §73.4235.

[87] The Class A to Class C1 increase is only 1 kilometer, which should not result in the "grandfathering" of many NCE-FM stations.

[88] Only Channel 220 is affected.

[89] It may be necessary to exclude Canadian and Mexican border area Class A stations from the initial list and to publish subsequent lists for these stations when international coordination procedures are complete.

[90] Because the appearance of a particular station does not constitute a modification of license, the Commission may correct the list of stations by adding or deleting stations included or excluded by administrative error without affording subject stations the opportunity for hearing.

[91] This includes replacement of the transmitter with one capable of higher power output.

[92] The supplemental exhibit is provided as Appendix B to this order. It contains a question and an informational showing requirement related to the potential for exposure of workers or the general public to hazardous levels of radio frequency energy. It also contains a certification that the licensee has conducted appropriate technical studies to determine that the increased power operation complies with the Commission's rules, and that the licensee agrees to immediately, upon written notification from the Commission, reduce power back to the level specified in the station license, if the Commission determines that the increased power operation is not in accordance with the rules.

[93] If an FCC Form 302 or supplement reveals any discrepancy from the licensed parameters of record (*e.g.*, geographical coordinates, antenna heights), the Commission delegates authority to the Chief, Mass Media Bureau, to order that the Class A station be returned to its licensed parameters. and to require the station licensee to file other forms or informational showings as necessary.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations.

This Report and Order strikes the right balance. Class A broadcasters, in great numbers, have urged us to increase their power. Suburban sprawl and other demographic changes have made it impossible, in many cases, for Class A stations to reach their natural market. In addition, Class A station say they suffer from shadowing problems resulting from tall buildings or uneven terrain; problems in penetrating steel or concrete buildings; and interference resulting from temperature inversions. With more power, Class A stations could overcome some of these obstacles. On the other hand, many Class B and C licensees argued that Class A stations should not be permitted to cause interference to other stations.

In this proceeding, we have increased maximum power for Class A's to 6000 watts, and increased our spacing requirements to account for the increased power. Stations that comply with the new spacing requirements will be able to increase power quickly, even before we process their applications. We will allow other Class A stations to increase power on a case-by-case basis.

At the same time, we are providing Class B and C stations the same level of interference protection that they enjoy under our current rules. By taking this measured

approach, we have given significant relief to Class A stations while maintaining the integrity of the FM Table of Allotments.

My greatest concern in voting for this item is that it will further strain our already limited resources. Make no mistake-- this decision will significantly increase the processing time for all FM applications. Without additional resources, the staff estimates that the median processing time for FM applications will increase from four months to twelve months. The median age of minor change applications will increase from six months to 18 months. Longer processing time is costly to the entire FM radio industry because initiating new service or changing an existing facility will no longer be accomplished as quickly.

Nevertheless, I cannot vote to deny relief to Class A broadcasters solely because of the delays this action will create for Class A stations and other FM applicants. In light of the continuing, severe pinch on our resources, I hope that Congress will see fit to give us the money we sorely need to do our job more efficiently.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-17

In re Applications of

DONALD E. HILGENDORF File No. BPH-861020TA

TRAN BROADCASTING CORPORATION, INCORPORATED File No. BPH-861020TB

For Construction Permit for a
New FM Station at
Brookfield, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 1989; Released: August 17, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is a "Petition for Reconsideration" filed by Donald E. Hilgendorf (Hilgendorf) on July 21, 1989, seeking reconsideration of our *Memorandum Opinion and Order*, 4 FCC Rcd 5004 (Rev. Bd. 1989), remanding this proceeding to the presiding Administrative Law Judge (ALJ) for further hearing on Hilgendorf's financial qualifications.

2. Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. §1.106(a)(1), is clear in its restrictions on reconsideration of Review Board interlocutory actions. Thus, on this basis alone, Hilgendorf's petition must be denied.

3. Moreover, we note in passing that in our *Order*, the Board stated (at para. 3; footnote omitted):

> Both parties have submitted exceptions to the ALJ's findings and conclusions on the comparative factors. Tran, however, additionally raises exceptions to the ALJ's failure to add basic qualifying issues with respect to Hilgendorf (*i.e.*, financial and real-party-in-interest). Our initial review of the foregoing documents, and the transcript of the proceeding below, indicates that Tran's exceptions give rise to substantial and material questions concerning Hilgendorf's financial qualifications, and the representations made with respect thereto.

While Hilgendorf fully discussed the exceptions of Tran Broadcasting Corporation, Incorporated (Tran) with respect to his financial qualifications, (Reply to Exceptions, pps. 6-9; Exh. A), Hilgendorf did *not* raise the issue it now relies upon in its instant petition (*i.e.*, Hilgendorf's hearing testimony concerning finances alleged to be improperly admitted by ALJ).

4. More importantly, the Board relied on more than the hearing testimony of Hilgendorf in reaching its determination that substantial and material questions were present with respect to Hilgendorf's financial qualifications; that is, the exceptions and replies thereto filed by the parties (including a specific declaration of Hilgendorf regarding his finances (Reply, Exh. A)). Thus, even if the Board ignored the interlocutory status of its remand order, we would find immediately unpersuasive the arguments now proffered by Hilgendorf.

5. ACCORDINGLY, IT IS ORDERED, That the "Petition for Reconsideration" filed July 21, 1989 by Donald E. Hilgendorf IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PEPPER SCHULTZ — **MM DOCKET NO. 83-1206**
Sparks, Nevada — File No. BPH-820519AK

COMSTOCK BROADCASTERS, INC. — **MM DOCKET NO. 83-1207**
Sparks, Nevada — File No. BPH-820628AQ

For Construction Permit for
a New FM Radio Station

Appearances

Herbert D. Miller, Jr., on behalf of Pepper Schultz; and *David M. Hunsaker*, on behalf of Comstock Broadcasters, Inc.

DECISION

Adopted: August 7, 1989; Released: August 17, 1989

By the Review Board: MARINO (Chairman) and BLUMENTHAL; Board Member ESBENSEN not participating.

Board Member BLUMENTHAL:

1. The Board has before it the *Further Supplemental Initial Decision*, 4 FCC Rcd 2386 (1989) (hereinafter *FSID)* of Deputy Chief Administrative Law Judge James F. Tierney (hereinafter ALJ) in the above-captioned comparative broadcast licensing proceeding. Also before the Board are exceptions to the *FSID* filed by Comstock, and a reply thereto filed by Schultz. Oral argument was heard on July 21, 1989.[1]

BACKGROUND

2. This case, the latest segment of what the ALJ aptly termed an "epic-like trilogy," *FSID* at para. 68, has been before the Board on two prior occasions: *First*, four-and-a-half years ago (January 28, 1985 to be exact) the Board remanded this comparative broadcast licensing contest to the presiding ALJ to determine (a) whether Pepper Schultz, with a proposed staff of "*zero*" employees, could effectuate his application proposal to operate a full service commercial broadcast station all by himself for 24 hours per day, 168 hours per week, for several months until (according to Schultz counsel) "the money started rolling in"; and, (b) whether Schultz was, therefore, financially qualified to be a licensee. *Pepper Schultz*, 58 RR 2d 434 (Rev. Bd. 1985) (hereinafter *Board Remand Order)*. And, *second*, one year later (January 24, 1986 to be exact), when after a supplemental evidentiary hearing on the two aforecited issues, the Board found that Schultz had failed to meet his burdens of proof on the two issues or demonstrated "good cause" to amend his application, and accordingly concluded that Schultz was not basically qualified to a grant of a broadcast Construction Permit. *Pepper Schultz*, 103 FCC 2d 1052 (Rev. Bd. 1986) (hereinafter *Board Decision)*.

3. By way of further brief reprise, our 1985 *Board Remand Order* noted that the ALJ's initial findings and conclusions reflected that:

> Schultz for an indefinite initial period, would be the sole employee and operator of the station: he would do all of the announcing, sell all of the commercials, do all of the engineering, billing, etc. until such time as the station had a cash flow sufficient to hire personnel. He stated he has given no thought to what personnel he might hire at that time.

58 RR 2d at 435 (quoting *Initial Decision)*. Finding that Schultz's proposal to operate the station 24 hours per day, 168 hours per week, performing all of the myriad engineering, business, sales, and on-air functions, with "*zero*" employees appeared "inherently incredible," *id.*, at 438, the Board, "[a]t risk of some derision" (*id.*), sent the case back to the ALJ on the aforementioned staffing and financial issues to assure Schultz his full administrative due process. Moreover, and importantly, the Board noted the fact that shortly after the initial oral argument before the Board, and:

> . . . on December 26, 1984, Schultz filed a Motion for Leave to Amend to reflect that Schultz intends "to rely on an automated transmission system (ATS) and on help provided without charge by friends to permit his proposed station to operate twenty-four hours per day with no 'employees.'" . . . Putting aside for the moment precisely *what* Schultz seeks to "amend," the motion will be denied. Post-hearing designation amendments are governed by 47 CFR § 73.3522(b), and an amendment will not be accepted unless it meets all six of the "good cause" elements set out in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 [18 RR 2d 820] (Rev. Bd. 1970). Schultz's Motion does not show "good cause"; in general, it simply asserts that "Mr. Schultz has given considerable additional thought to his proposal, and has concluded that the slight modifications made in the attached amendment are necessary." . . . It seems Schultz now concedes that his original proposal would shortly grind Pepper down with a workload not to be sneezed at.

Id., at 437 n.6 (internal citations omitted). The Board thereby made it clear that the supplemental hearing ordered therein was to be upon the efficacy of Schultz's *original* application proposals, unless all six prongs of the "good cause" amendment test had been satisfied.

4. Notwithstanding that specific caveat, our 1986 *Board Decision*, issued after completion of the first remand hearing, and upon exceptions to the *Supplemental Initial Decision*, 103 FCC 2d 1066 (ALJ 1985), found that the ALJ had permitted Schultz to blithely abandon his initial application proposals, and to freely amend his application

without any reference whatsoever to the mandatory "good cause" amendment test set forth in §73.3522(b) of the Commission's Rules. Rather, the ALJ opined:

> Yet, though Schultz's earlier notion to operate his proposed station with no employees suggested Herculean commitment, this side of realism, given further and sober thought, albeit afterthought, he did amend his application to propose a more enlightening staffing proposal. (*See Memorandum Opinion and Order*, FCC 85M-1599, released April 12, 1985, para. 7.) That amendment was unopposed and was accepted under governing law with the *caveat* of no comparative advantage.
>
> * * *
>
> The Schultz latest staffing proposal of a full-time staff of five (three announcers, a secretary and himself) and a part-time staff of six (all announcers) for the type of facilities here appears reasonable. To say this, no enhancement is endowed to Schultz under abiding comparative canons. Simply stated, his first proposal smacked of seeming naivete' faced with the customary demands of a start-up operation of an FM station.

Id., at 1073. Honoring "Schultz's corrective response in his amendment" (*id.*), the ALJ excused Schultz's original and patently incredible staffing proposal by observing: "Had Schultz been denied his quest to amend, his whole standing may have been fatally imperiled." *Id.*, at 1074. With no greater justification, Schultz was permitted to amend his original financial proposal. *See id.*, at 1074-1077.[2]

5. Upon review, we held the ALJ's acceptance of Schultz's three-year late amendments to be, in essence, "plain error," especially since our *Board Remand Order* had specifically rejected Schultz's post-oral argument staffing amendment, and despite our admonition that no new staffing proposal would be accepted in the absence of a "good cause" showing. *Board Decision*, 103 FCC 2d at 1054-1058. To the same effect was our view of Schultz's 1985 financial amendment. Even assuming, *arguendo*, the permissibility of Schultz's late amendments, we found improbable, to say the least, Schultz's portended operating modality, to wit:

> Schultz's staff will be required to work in a studio space of [3]00 square feet, which will accommodate a studio control room, Schultz's office, the bookkeeper/traffic person's office and a production room. (Tr. 188). Schultz does not intend to provide air conditioning in an area where the temperature sometimes climbs to as high as 101^0- 102^0. (Tr. 190). He does not intend to hire any sales staff or news personnel. *Id.* Schultz proposes to do all of the sales for the station himself. (Tr. 195-96).
>
> * * *
>
> Schultz would not produce his own commercials. (Tr. 204). He proposes to sell an advertising contract to an advertiser, and then direct the advertiser to one or more local advertising agencies which have facilities to make commercials. The agency would write the copy and produce the commercial, charging the advertiser a fee for the service. (Tr. 204-205). Schultz did not know, and has not asked any agencies what they would charge the advertiser for the writing and production service. (Tr. 206). He has inquired of several agencies whether they have production facilities available (Tr. 205), and has asked agency personnel to "get their tape recorders ready." (Tr. 206). Schultz would ask that the commercials be produced on a tape cassette, if the agency can do it (Tr. 208), as he does not have on hand, and does not plan to purchase initially any cartridge or "cart" record/playback.

Id., at 1064 n.14 (quoting *Supplemental Initial Decision).* As to Schultz's original staffing proposal, we noted Schultz's declaration that:

> [w]hile I had originally intended to hire no employees during the initial period of operation, and to rely on help provided by friends at no charge, I have changed my plans and now intend to hire . . . employees.

Id., at 1055 (quoting Schultz Exh. 2 at 4). But, we recalled:

> When he filed his application on May 19, 1982, and until December 26, 1984, Schultz repeatedly insisted that he would operate the proposed station completely by himself during the initial three-month period. *S. I. D.*, para. 5; *I. D.*, Concls. para. 6. Schultz indicated that he would have no money for hiring employees for a period of several months "when the money started rolling in." *Remand Order* at n. 4; *see also id.*, at n.3 (quoting hearing transcript of Schultz testimony). He apparently had a hazy idea that, by using studio automation equipment and an automatic transmission system, he could somehow operate the station for several months as a total one-man show, *24 hours per day*, with no human assistance of any kind. *Id.*; Tr. 43-49, 220. That is, Schultz testified that he intended to personally operate the station, including the performance of all the necessary announcing, engineering, sales, news, programming, business functions, *etc.*, *I. D.*, Concls., para. 6, with *no* staff whatever. At oral argument held December 12, 1984, we made apparent our skepticism over Schultz's patently incredible staffing proposal. *See* Tr. of Oral Arg. at 119 *et seq.* Realizing, then, that a remand on a staffing issue was legally unavoidable, Schultz hastily filed a motion for leave to amend his application to substitute an entirely new staffing proposal, therein specifying reliance "on an automated transmission system (ATS) and on help provided without charge by friends [six acquaintances] to permit his proposed station to operate twenty-four hours per day with no

> 'employees'." *See Remand Order*, at n.6. We there denied Schultz's motion because he wholly failed to demonstrate "good cause" for the amendment in accordance with the tenets of 47 CFR § 73.3522, *see id.*, and we remanded the case, *inter alia*, on a staffing issue because Schultz's operational plans in this regard were, on their face, incapable of effectuation. *Remand Order* at paras. 4-5 & n.8 (citing *KOWL, Inc.*, 49 FCC 2d 962, 966 (Rev. Bd. 1974), and *Brookhaven Broadcasting Co., Inc.*, 50 FCC 2d 703, 708 (Rev. Bd. 1975)). In remanding, we admonished that no new staffing proposals should be proffered; instead, the remand hearing was simply to provide Schultz with a due process opportunity to demonstrate, if possible, how his facially absurd proposal could be effectuated.

Id., at 1054-1055 (emphasis in original; footnote omitted). And we concluded:

> Most critically, Schultz's failure to take reasonable steps to timely develop a *bona fide* staffing proposal has grossly delayed this proceeding. As was made abundantly clear in *Adjudicatory Re-Regulation*, 58 FCC 2d 865, 871 (1976), the broadcast application process is not a "paint-by-numbers" exercise, in which applicants fill in their proposals, even as they proceed through comparative hearings – and beyond. Such a process is inconceivable, and Schultz's post-hearing dabbling with his application is the antithesis of the fair, orderly process established by the Commission . . . . Further, because he utterly failed to satisfy four of the six criteria of the Commission's test for "good cause," Schultz's 1985 motion for leave to amend should have been denied. Having filed his application in May, 1982, it should not have taken Schultz nearly 3 years to appreciate that a round-the- clock radio operation would need some minimum semblance of a staff. His insistence throughout the comparative hearing that he alone would perform all of the myriad functions of an ongoing broadcast station – with neither sleep nor surcease – constituted irrefragable evidence that Schultz was either distantly out of touch with reality or singularly qualified for the laurel of "FCC Fabulist of the Decade."

Id., at 1057. Observing that Schultz's 1982 application was, on the face of it, inherently incredible, we called on the Commission's application processing staff for "more active scrutiny at the earliest application review stage," *id.*, at 1063, denied Schultz's application, and granted the competing application of Comstock.

6. Upon Schultz's application for review of the 1986 *Board Decision*, the full Commission squarely affirmed on both the staffing and financial issues. *Pepper Schultz*, 2 FCC Rcd 1476 (1987) (hereinafter *Comm'n Decision*). It further agreed emphatically that Schultz should not have been permitted to amend his original application "in a situation like this where good cause for acceptance of the amendment was patently lacking in the evidence, [and] review of the ALJ's action was appropriate." *Id.* Ratifying the Board's finding of "plain error" in the ALJ's actions, the Commission explained (*id.*):

> In the instant case we agree that a notable lack of good cause precludes acceptance of the amendments. As the Board notes, the record indicates that Schultz had lacked diligence in formulating his initial staffing and financial proposals. Under these circumstances there are no equities justifying Schultz's being permitted to moot questions concerning his lack of qualifications by means of a last minute curative amendment. We find Schultz's financial proposal particularly troublesome because Schultz certified in his application that he was in compliance with the Commission's financial requirements. Contrary to the conclusions of the ALJ, we agree with the Review Board that further hearings would be required to explore the *bona fides* of Schultz's representations in light of the record developed concerning Schultz's proposals. This factor further militates against a finding of good cause.

7. The five-year odyssey of the Schultz/Comstock vessel appeared to have finally terminated, until – by *Order*, FCC 87I-065, released June 29, 1987 – the Commission's Office of General Counsel invited Schultz to supplement the record on his *original* staffing and financial proposals (*id.*; footnote omitted):

> Although the present record contains considerable evidence regarding Schultz's original staffing and financial proposals, it appears desirable to ascertain what additional evidentiary showing Schultz believes he could have made if there had been an evidentiary hearing on his original staffing and financial proposals, in order to determine whether a remand is warranted. Thus, Schultz will be given the opportunity to submit to the Commission a statement indicating what further showing could be made as to the sufficiency of those proposals. He should submit affidavits or declarations containing the substance of any testimony he would have introduced and should attach copies of any proposed exhibits. He may also include an explanatory pleading of no more than ten pages. Comstock will have the opportunity to file a response of no more than ten pages.

8. Schultz filed his supplementary material; but, by *Memorandum Opinion and Order*, 3 FCC Rcd 1200 (1988) (hereinafter *Comm'n Remand Order*), the Commission returned the proceeding to the ALJ, for a third time, for a further supplemental initial decision on both the original staffing and financial issues. As to staffing, the Commission stated (*id.*, at 1201):

> The pleadings before us raise substantial and material questions of fact which relate to Schultz's qualifications to be [a] licensee and, therefore, should be explored at an evidentiary hearing. First, we are troubled by the seeming discrepancy between Schultz's evidentiary showing, now before us, and the present record. For example, the Board in its remand order found that Schultz had not previously referred to using volunteers to run the station. 58 RR 2d at 437. Moreover, the ALJ's findings in the supplemental initial decision seem to support Comstock's allegation that the proposal set forth in Schultz's submission is not his original plan, but

> one first formulated in an amendment rejected by the Board. *Pepper Schultz*, 103 FCC 2d at 1067-68. The present record provides no basis on which to resolve this dispute. Accordingly, a further hearing is necessary to decide this substantial and material question of fact. We also find a substantial and material question of fact as to whether the virtual one-man operation of Schultz's proposed commercial FM radio station can be effected. We therefore remand this proceeding for further hearings.

As to finances, it declared (*id.*):

> We find that the pleadings before us raise substantial and material questions as to Schultz's financial plan. As in the case of Schultz's staffing proposal, we are troubled by the seeming discrepancy between his present showing and the existing record.

9. With suitable alacrity, the ALJ organized the process for the second remand hearing, directing that Schultz submit to discovery by Comstock on the issues. Shortly thereafter, however, attention was stolen away from Schultz, and toward Comstock, in the wake of a letter of April 22, 1988 from U.S. Senator Chic Hecht directed to the presiding ALJ.[3] Senator Hecht's letter referred to the ALJ a missive of April 18, 1988 to the Senator from Bob Carroll, the controlling owner (51%) of Comstock, in which missive Carroll related to the Senator the status of his application, criticized Schultz's competing proposal, complained that "after six years, [Comstock] would like to see where this action may be headed," advised that "[a]ny inquiries your office may be able to give this matter would be greatly appreciated," and closed by inviting the Senator's staff to call Carroll with any questions.[4] Pursuant to the Commission's *ex parte* procedures, the Senator's correspondence was deflected to the Commission's Managing Director, who responded politely to the Senator.[5] In light of the Senator's unusual letter to him, the ALJ, by *Memorandum Opinion and Order*, FCC 88M-2012, released June 28, 1988, added against Comstock a hearing issue:

> To determine whether Comstock Broadcasters, Inc. solicited a prohibited *ex parte* presentation in this proceeding, and if so, under the evidence adduced, whether Comstock Broadcasters, Inc. is qualified to become a Commission license.

A further supplemental evidentiary hearing on the staffing and financial issues against Schultz, as well as on the *ex parte* solicitation issue against Comstock, was held in the waning months of 1988.

FURTHER SUPPLEMENTAL REMAND HEARING

Schultz Staffing Issue

10. The ALJ took evidence on Schultz's staffing plans, and his findings of fact are narrated in paras. 7-22 of the *FSID*. Schultz has filed no exceptions to those findings, nor challenged them in any way. The salient ALJ findings are these: (1) Section IV-A of Schultz's application (FCC Form 301) specified that Schultz proposed to operate 24 hours per day, 168 hours per week, using "zero" employees[6]; (2) Schultz "was not counting on or thinking that he would use a friend, paid or unpaid" to assist in this virtuoso endeavor, but rather "Schultz said that his plan was to rely on automation equipment and some sort of alarm system or answering device to operate the station" unassisted[7]; (3) however, "Schultz later stated that it had been his original intention to rely on help provided by friends at no charge,"[8] that "several close friends from the Sparks area had promised their unpaid help,"[9] but that "he had not asked anyone if they would volunteer some help,"[10] and that "Schultz did not recall how he informed counsel that he had friends who could help him staff the station,"[11] though he "felt" all through the proceeding that "if [I] ever needed help that I would go to some of my friends"[12]; (4) Schultz claimed "that a man named Frank Way had offered, years ago, to assist Schultz,"[13] but Way's offer was for help in constructing the station and "did not include an offer to help staff the station"[14]; (5) that[15]:

> Schultz decided to change his staffing plans based upon opinions expressed by Review Board members during the [1984] oral argument. It was at that time that he went to his friends to see if they would help him staff the station, and to obtain affidavits (Schultz Deposition Tr. 40-41);

(6) while Schultz had speculated that he could operate solo for the first several months by using an automated transmitter system (ATS), the Commission's Rules at that time flatly prohibited such an unattended operation,[16] but Schultz asked for no waiver of the ATS rules with his application "because he did not think he would be going through a hearing with a competing applicant,"[17] though he was "hopeful" to get an ATS rule waiver "after" he received the Construction Permit, not knowing whether such a maneuver would be "legal"[18]; (7) "Shultz did not write everything out as to what he needed" for his ATS vision,[19] "didn't spend too much time figuring out everything that I have to have on this ATS panel,"[20] but "felt" he "would have built it or improvised it and got it together"[21]; (8) however[22]:

> About when he became aware that the Commission's ATS rules would not permit his proposed one-man operation, Schultz said "I would have done what I could have done by the rules and regulations. And that is a hard one to answer" (Schultz Deposition Tr. 55).

11. In his conclusions of law, the ALJ resolved that whereas Schultz's:

> proposed ATS monitoring plan, without station employees, would have been at great odds with the then governing Rules, he did abandon that plan, and decided to rely on "friends." Also, his proposed original plan "to operate on a twenty-four hour basis" daily except Sunday, with prodigious efforts, might be achievable when translated into the requirements of Rule 73.1740 mandating a *weekly* schedule of seventy-two hours. This condition, of course, ignores the common frailties of human nature, among which are unpredictable bouts with illness and other human burdens. Yet, and not with-

> out supposed predilection or pre-disposition in anyone's favor, Schultz's staffing, as originally conceived, ATS having been abandoned (quite properly), would also be marginal in its achievement, teetering, but not wholly unreasonable.

FSID at para. 77 (emphasis in original). Earlier, the ALJ considered that:

> Schultz's staffing proposal has obviously changed during the nearly seven year duration of this proceeding, in response to changing conditions. It has gone from slight reliance to the minimum extent necessary on help from "friends" at the beginning, to substantial reliance on unpaid friends later, to no significant reliance on unpaid friends in his most recent financial and staffing amendment (Schultz Proposed Findings p. 29, para. 12).

Id., at para. 73. In the final analysis, the ALJ observed (*id.*, at para. 80; emphasis in original):

> But the mission here is to test and appraise the "adequacy" of Schultz's 1982 financial and staffing plans and, if so, under the evidence, whether that test lends support to the previously made findings of good cause for acceptance of his 1985 financial and staffing plan. They have been found *adequate*, albeit barely so; and it is so concluded. With that premise, even though at the outset of his filing in 1982, being a supposed kind of classic in naivete, perhaps prompted (erroneously) by the absence of challenge in the *Hearing Designation Order* (*HDO*), (MM 83-662, released November 10, 1983, and that *HDO's* acceptance as qualified (para. 17)), Schultz remained fully comfortable in his quest; as the time in this long journey progressed and with the later engagement of experienced communications counsel, that inert condition was attacked, particularly by his challenger at bar, Comstock, and then he got about getting his house in better order, not as Comstock would have it in *1982*, but alerted and spurred by that Comstock challenge in the months following the *HDO* in November 1983, with the scheduled hearing date, January 12, 1984, later changed to January 13, 1984 and again to March 27, 1984.

12. *Exceptions*. In its exceptions to the *FSID*, Comstock complains that the ALJ erred, again, by permitting Schultz to amend his original staffing proposal and to reduce his proposed hours of operation from 168 hours per week to, possibly, 72 hours per week nearly three years after Schultz's filing of his application.[23] Comstock also faults the ALJ for his refusal to add lack of candor issues against Schultz for his perceived contradictions on two key points: (1) whether Schultz contemplated the use of "volunteers" prior to the filing of his application, or not until after the Review Board's first oral argument in late 1984[24]; and, (2) whether Schultz knew his ATS scheme (albeit gauzy) was prohibited by FCC rule prior to the filing of his application, or not until so advised by counsel after the initial hearing.[25]

13. Schultz replies that he proceeded in good faith on his original staffing proposal, that he recalls some offers of help from friends (even if his recollections of who volunteered were now "less than vivid"), that it was not until 1984 "when the flaw in his ATS plan was pointed out to him," and that the ALJ was therefore correct in allowing Schultz to amend his original proposal, citing, *inter alia*, *Opal Chadwell*, 4 FCC Rcd 1215 (1989).[26] In sum, Schultz argues that "Mr. Schultz's original staffing . . . plans were neither lunatic nor demented . . . ."[27]

14. *Discussion*. The ALJ's findings of fact, to which Schultz does not except or seek to correct one iota, demonstrate beyond sensible dispute that Schultz's original staffing plan (or, more accurately, anti-staffing plan) was insufficient to effectuate his application proposal to operate 24 hours per day, seven days per week, for the first several months. Concurring with Comstock, we find that the *FSID*, paras. 9-10, encapsulates but does not satisfactorily resolve Schultz's yet-pregnant conflict over whether Schultz intended to rely upon "volunteer" assistance at the time he applied, or whether he did not seize upon "volunteer" labor until after the Board's 1984 oral argument. The recorded facts reflect:

> Schultz did not recall how he informed counsel that he had friends who could help him staff the station (Schultz Deposition Tr. 57). He wasn't sure when his counsel asked him how he intended to get around the ATS rules in operating the station without a staff. He thought it was during or after the Review Board's oral argument. "I just kind of sensed that I was going to be remanded." He said this was based upon the oral argument. He said he could not recall when the conversation occurred (Schultz Deposition Tr. 56-57; 58).

Id., at para. 16. Still, at the hearing Schultz conceded that he had actively sought no firm "volunteer" assistance prior to the filing of his application, *id.*, para. 11, that he had given little thought to his proposed transgression of the ATS rules, *id.*, paras. 18-20,[28] and that he filed in the "belief" that he might call upon friends to help him, "to the least extent possible," if it came to that.[29] We accord with Comstock that this is "no plan at all." The legal standard on staffing, set forth in cases such as *KOWL, Inc.* 49 FCC 2d 962, 966 (Rev. Bd. 1974) and *Brookhaven Broadcasting Co., Inc.*, 50 FCC 2d 703, 708 (Rev. Bd. 1975), is that we will reject a staffing proposal if it is "inherently improbable." Pepper Schultz is a synonym for that descriptive standard.

Schultz Financial Issue

15. At the instant hearing, "Schultz estimated that for a real 'top notch' radio station he would need 14 employees, whose salaries would total $180,000 (annually). He said he recognized that he could not afford to do this initially, but would have to wait until the money came in (Schultz Deposition Tr. 30-32)." *FSID* at para. 7. Unfortunately, Schultz claimed to have only the following resources available to him to construct the new FM radio station and to operate that station for its inaugural three months, without resort to any advertising revenue[30]:

Cash on hand or in banks	$12,607
Gold and other rare coins	1,072
Federal Retirement Account	3,479
	$ 17,158

Id., at para. 39. At various other times he seemingly listed his available assets in 1981 as $13,259 and $14,370, neither of which figures apparently reflected Schultz's claim to valuable coins. *Id.*, para. 40. However, we note in passing that, in our prior *Board Decision*, Schultz's amended proposal indicated an estimate of $74,302.26 for construction and start-up expenses, though this latter estimate seems to have presumed Schultz might actually utilize employees. *See* 103 FCC 2d at 1058.

16. In any event, predicated upon resources approaching Schultz's purported $17,158, he contemplated the following three-month inaugural budget:

Rent ($250 per mo.)	$ 750
Electricity & Water	525
Telephone	75
Gas (auto)	250
Legal	0
Food	1300
Contingencies (Insurance)	800

FSID at para. 28. However (*id*):

> In attachment B to his Submission to the General Counsel's Office and his Remand Showing, Schultz increased his estimate of utilities (water, electricity, telephone) to $1,500 (from $600), added an estimate for ATS monitoring which had not been previously included, added office supplies of $350, and reduced food and contingencies from $2,100 to $1,500. Nothing was added for legal or for auxiliary power.

The rent figure was the rent for his house, *id.*, para. 30; and:

> The increased sum of $1,500 for utilities (which included telephone and all power consumption) was arrived at by discussions between Schultz and his counsel, and was not made contemporaneously with the filing of his 1982 application. He did not know what he had gauged it against (Schultz Deposition Tr. 137).

Id., at para. 31. We interject that although Schultz's budget, even his "amended" budget, set aside no money for legal expenses (he originally filed *pro se)*, our 1986 *Board Decision* noted that his legal costs were, by then, $20,000, "a deficit he was said to be retiring at $600 per quarter." 103 FCC 2d at 1063 n.12. It is not now contended that Schultz's current debt for legal fees has diminished in the last three years. *See United Broadcasting Co.*, 53 RR 2d 57, 81 (1983) (financially disqualified applicant neglects, *inter alia*, legal fee allocation).

17. Moreover, while "Schultz's original financing plan included a lease-purchase of equipment in [the] amount of $40,000," *FSID* at para. 45, Schultz conceded that the quotation upon which he based that estimate was dated *after* he had already filed his application, *id*; and that the quotation "did not constitute commitments to lease to Schultz on those terms, but were subject to favorable review of his credit by [the supplier's] credit committee." *Id.* Further, the "original (1980) quotation for the ATS and automation equipment was $8,850 plus $3,000 labor cost." *Id.*, at para. 36. But, Schultz unilaterally reduced this cost estimate in 1982 to $4,000, based on his alleged interpretation of a phone call with one Robert Cairns; Schultz could find no letter from that supplier, and he didn't know whether the $4,000 ATS figure included the (previously quoted) $3,000 in labor. *Id.*, para. 37. Finally, while not part of his original plan of financing, Schultz claimed he could build the station with the following used equipment:

Transmitting equipment (used)	$5,950
Automation equipment (some new and some used, including ATS equip)	4,000
Transmission line equipment (used)	400
Antenna equipment (used)	1,200
Misc. installation costs	1,000
	$ 12,550

Id., at para. 32. Even here, however, Schultz based his $5,950 transmitter figure, he believes, on a 1981 quote; but he did not confirm that figure before filing his subject application, and he had no commitments on the said equipment. *Id.*, para. 33.

18. *Exceptions.* Comstock submits that the ALJ erred in holding that Schultz was financially qualified at the time he originally filed because: (1) Schultz had not prepared a financial plan prior to filing his application, and his cost estimates were unreasonable in any event[31]; (2) Shultz had no commitment for leased equipment, and he did not demonstrate a lack of question over his creditworthiness for a $40,000 equipment lease[32]; and, (3) Schultz lacked the net liquid assets to effectuate his proposal.[33] Schultz replies, citing *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), *review denied*, 3 FCC Rcd 4767, *appeal pending sub nom. Reimer Broadcasting Ltd.* v. *FCC*, No. 88-1659 (D.C. Cir., filed September 8, 1988), that he could rely wholly on leased equipment,[34] and that his assets of $17,158 were adequate to meet his projected construction expenses of $12,550 and initial, three-month operating expenses of $4,450.[35]

19. *Discussion.* Having held Schultz not basically qualified under the staffing issue, we might have avoided this issue altogether, but for the bizarre history of this case and the fact that the *Comm'n Remand Order* seems to call for a resolution of the financial issue it specifically designated. With respect to Comstock's first charge that Schultz had not contemporaneously documented his liquid assets or prepared an itemized projection of his anticipated expenses, the Board believes it is bound by two recent Commission decisions which – now for the first time – interpret the instructions to the (then newly) revised broadcast application form in use at the time Schultz filed his subject application, those decisions being *Susan S. Mulkey*, FCC 89-217 and *Northampton Media Associates*, FCC 89-215, both released on July 13, 1989.

20. Those companion cases indicate that, before the Commission's prior revision of its basic broadcast application form in *Revision of Form 301*, 50 RR 2d 381 (1981), *see also infra.* para. 21, an applicant had been required to file with its application a "detailed itemization of the projected expenditures and sources of funds[,] . . . a balance sheet, a statement of yearly income and assorted [other] documentations." *Id.*, at 382. While within that

1981 revision the Commission declared that its *substantive* financial requirements remained absolutely unaltered, it was clear from the language of the 1981 revision order that an applicant's supporting documentation need not be filed with the Commission; but, the instructions to the 1981 revised Form 301 contained the following admonition:

> Documentation supporting the attestation of financial qualification need not be submitted with this application *but must be available to the Commission upon request*. The Commission encourages that all financial statements used in the preparation of this application be prepared in accordance with generally accepted accounting principles.

Id., at 388 ("Section III Instructions") (emphasis added). In view of the Commission's continuing requirement that the underlying financial documentation "be available to the Commission upon request," not to say "prepared in accordance with generally accepted accounting principles," the Board had consistently interpreted that 1981 instruction as presupposing that the requisite financial documentation actually existed, though no submission was required unless requested by the Commission in corroboration of an applicant's bare financial certification. *See, e.g., Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986) (applications for Comm'n review pending). Our interpretation in this regard was somewhat reinforced when, responding in part to the Board's early warning signal in *Dutchess Communications Corp.*, 101 FCC 2d 243, 245 (Rev. Bd. 1985), that the Commission's new financial certification standard was being abused in case-after-case, the Commission issued a *Public Notice* advising broadcast applicants that, henceforth, its application processing personnel would spot-check financial certifications to assure that actual documentation supported the bare certification. *Certification of Financial Qualifications*, 62 RR 2d 638 (1987). However, the Commission's recent decisions in *Mulkey* and *Northampton Media* now say that the Board's consistent interpretation of the Commission's 1981 Form 301 instruction had been literal, and that an applicant using the 1981 revision of FCC Form 301 may prepare its basic documentation after the fact, if its finances are later challenged, even if that "preparation" comes years after the application filing.

21. Although the Commission has just lately come full circle since its 1981 revision of Form 301, has recognized that its 1981 financial "certification" process was an abject failure, and will again require applicants to submit upon filing both construction cost estimates and all funding sources, *Revision of Application for Construction Permit for Commercial Broadcast Station* (FCC Form 301), 4 FCC Rcd 3853, 3858-3860 (1989), Pepper Schultz did file his subject application under the bare certification version of Form 301; and, pursuant to *Mulkey* and *Northampton Media*, he need not show preparatory documentation of projected construction or initial operating costs. Comstock's exception to Schultz's failure to have documented his projected costs prior to filing his subject application must, accordingly, be rejected under these two new cases.

22. On the other hand, it is not argued that – even under the 1981 Form 301 – the Commission's *substantive* financial standard had been relaxed; it emphatically had not been. *GACO Communications, supra* note 30; *Dutchess Communications, supra*. Based on the entire record of this proceeding, Schultz has failed to meet his burden of proving that he could construct and operate for an initial three months (without resort to potential advertising income) a new commercial FM broadcast station, even assuming that his net liquid assets approached $17,000. Apart from the deficiency suggested on its face (recalling Schultz's *own* previous estimate of $180,000 for the first year, and his 1985 estimate of $74,000 to build and operate for the initial 3 months), Schultz's proposed budget and projected construction/equipment expenses of record lay bare the inadequacy of his resources. While these deficiencies are nearly self-evident, we shall highlight just a few notable gaps.

23. Schultz's anticipated three-month budget (*supra*, para. 16) called for $525 for electricity (and water), but Schultz here made no showing that this projection was at all reasonable, particularly his electric costs for a 24-hour per day operation of a 3 kw broadcast station. Considering the commercial nature of the new station, he did not explain the very low estimate for telephone expenses either. Nor did his record budget appear to account for the most routine items such as stationery, office supplies, postage, sales expenses, advertising, promotion, *etc.* Of course, considering that Schultz's budget allotted no money whatever for even *one* employee, these immediate frailties pale into cosmic insignificance. While there is, naturally, no bottom limit to what an applicant may budget for probable failure, the *raison d'etre* for the Commission's basic financial qualification requirement is that it believes some irreducible minimum is necessary for a reasonable likelihood of success. *See GACO Communications, supra*. Schultz has done little more than proffer to us his anemic three-month budget; he has not explained convincingly its probable sufficiency.

24. The same is true of Schultz's $12,550 estimate for equipment and construction costs (*supra*, para. 17). For instance, whereas the ATS equipment was central to Schultz's proposal (however fantastic) to operate without any staff whatsoever, his unilateral reduction of likely ATS expenses from nearly $12,000 to $4,000, without an objective confirmation of that later reduction, is typical of his lack of a persuasive showing of reasonable cost projections. Indeed, as the ALJ pointed out in his *Supplemental Initial Decision*, Schultz had not even provided for air conditioning in a climate where 100 degree (plus) temperatures are frequent, nor even for the equipment universally used to produce or record commercials, let alone produce news or public affairs programming (*see supra* para. 5). Noticeably absent from Schultz's equipment list also is the entire panoply of equipment generally common to commercial radio stations (consoles, turntables, microphones, tape recorders, production studio, soundproofing, monitors, *etc.*), although we concede to no practical idea of what Schultz actually may have had in mind for the station, and the record furnishes scant clue.

25. As to Schultz's alternative proposal to lease $40,000 worth of equipment, we do not disagree that the Commission's policy change announced in *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 168 (1980) (subsequent history omitted), no longer requires that an applicant proposing to lease certain broadcast equipment demonstrate its ability to do so, absent evidence that the applicant's creditworthiness is subject to doubt.[36] However, while Schultz claims that his unsubstantiated leasing proposal is controlled by *Armando Garcia, supra*, the situ-

ation here is quite dissimilar. There, Garcia had received prior "written assurance" from the equipment supplier, a detailed description of the equipment and the terms of the loans, as well as a firm commitment from that equipment firm's president that a lease would be extended. *See id.*, 3 FCC Rcd at 1066. Here, Schultz merely pondered "proposals"; he neither sought nor received supplier assurances. *See FSID*, paras. 45-46. Additionally, there is not a scintilla of evidence that any equipment leasing company was aware of Schultz's scanty resources, of his extraordinary proposal to initiate a new commercial FM broadcast station with no employees, using every dime of his alleged liquid assets, or of the other startling operating conditions Schultz depicted. (*See supra* para. 5.) Even Schultz admits that his fundamental operating proposal was severely "flawed,"[37] to say the least; and, we believe that the evidence presented by Schultz ineluctably raises a *prima facie* question as to whether a conventional equipment supplier would extend $40,000 in credit for Schultz's abnormal operation. Schultz was keenly aware of the financial issue against him, of the skepticism about his financial resources and his superhuman operating proposal, and yet he did not adduce at this third hearing a solitary grain of evidence to support his bald claim of an ability to lease $40,000 in essential broadcasting equipment. Under the facially troublesome dimensions of Schultz's overall proposal, we find that Schultz's creditworthiness was patently subject to doubt, and that Schultz made no effort to exhibit his creditworthiness in 1981 or to demonstrate serious offers to lease to the eccentric station Schultz purportedly envisaged. Finally, even if we assume, *arguendo*, the availability of leased equipment, Schultz's lack of apparent resources for other routine start-up expenses (*e.g.*, total lack of personnel expenses) renders the question of leased equipment almost moot. Taken as a whole, Schultz has utterly failed to demonstrate his financial ability to construct and operate a viable commercial broadcast station. *See United Broadcasting Co., supra*, 53 RR 2d at 78-81 (applicant disqualified; cost estimates and resources "unrealistically low"). *See also GACO Communications, supra; cf. Central Alabama Broadcasters, Inc.*, 97 FCC 2d 654 (Rev. Bd. 1984), *aff'd sub nom. Oyster v. FCC*, 776 F.2d 365 (D.C. Cir. 1985) (Table).

Schultz's Post-Hearing Amendments

26. In both our *Board Remand Order* (*see supra* para. 3) and in the *Board Decision* (*see supra* para. 5), we rejected Schultz's post-hearing amendments to his staffing and financial proposals because of his glaring failure to meet the required "good cause" test. We need not again rehearse the practical policy reasons undergirding the Commission's strict "good cause" test, *see Board Decision*, 103 FCC 2d at 1056-1058; it is obvious why, in a comparative setting, all competing proposals must be frozen at an early point in time so that a static comparison may be fairly made.[38] The *Comm'n Decision* (*see supra* para. 6) stoutly reaffirmed that amendment principle in this case, and it is beyond gainsay that the Commission's later *Remand Order* did not abandon that abiding regulatory principle. Instead, it reluctantly accepted Schultz's contention that he lacked sufficient opportunity at the two prior hearings to prove out his *original* application proposals, since the ALJ had erroneously accepted his very late amendments. The plain and singular purpose of this third evidentiary hearing was to permit Schultz to support (if he could) those *original* proposals, particularly in view of apparent "discrepancies" between his submissions to the General Counsel and his representations at prior occasions in this proceeding.

27. Despite these antecedent appellate rulings, the ALJ commented "that the notion of *stare decisis* may not be controlling here," *FSID* at para. 68 (footnote omitted); and it is clear that the ALJ's ultimate conclusion that Schultz was basically qualified incorporated, again, Schultz's post-hearing designation amendments. *See, e.g., FSID*, para. 72 (Schultz abandons ATS proposal as starkly inconsistent with FCC rules); para. 73 ("Schultz's staffing proposal has obviously changed during the nearly seven year duration of this proceeding")[39]; paras. 77 and 91 (accepting a wholesale reduction of Schultz's proposed weekly operating hours from 168 to 72). With great respect to the ALJ, the doctrine of *stare decisis* is inapposite here, and we are duly instructed in this remand phase by "the law of the case," *see generally Northwestern Indiana Telephone Co., Inc.* v. *FCC*, No. 88-1521, slip op. at 12 (D.C. Cir. April 11, 1989), which juridical doctrine demands that we focus on the efficacy of Schultz's *original* proposals, unvarnished by his post-hearing modifications.

28. Citing the Commission's recent decision in *Opal Chadwell, supra*, Schultz now urges that the ALJ had broad discretion to accept his late application amendments because Schultz "proceeded in good faith," has been "reasonably diligent in attempting to establish his qualifications," and had "a reasonable basis for his original financial and staffing plans."[40] Not only does the record belie Schultz's claims of the reasonableness of his *original* proposals, and of diligence in pursuing rational amendments, his reading of *Opal Chadwell* is perpendicular to its true holding. There, and not unlike the instant case, the Commission on appeal called for Chadwell to supplement her initial financial proposal; but, finding her supplemental material to be inadequate to support her basic financial enqualification, the Commission remanded the entire case back to the ALJ with the following injunction:

> In this regard, the ALJ would have to examine Chadwell's original proposal to determine whether she had a reasonable basis for making it. *See Pepper Schultz*, 2 FCC Rcd 1476, paras. 3-4 (1987), *recon. granted on other grounds*, 3 FCC Rcd 1200 (1988).

4 FCC Rcd at 1217. Especially in light of *Opal Chadwell's* citation to this very remand, there is no doubt that Chadwell was required – as was Schultz here – to demonstrate the validity of her *original* proposal at her supplemental hearing. No broadcast aspirant may proceed to hearing with a fatally flawed application proposal, and then freely amend each time its proposals are subsequently questioned or debunked on the record. 47 CFR §73.3522; *see also Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 and 95 FCC 2d 444 (Rev. Bd. 1983), *aff'd sub nom. Royce Int'l. Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (Table), *cert. denied*, 474 U.S. 995 (1985); *Dutchess Communications, supra*; *cf. Coastal Bend Family Television, Inc.*, 94 FCC 2d 648, 652-656, *recon. denied*, 95 FCC 2d 551 (Rev. Bd. 1983), *remanded sub nom. Christian Childrens Network, Inc.*, 101 FCC 2d 612 (1985) (on financial amendment issue), *on remand*, 1 FCC Rcd 982 (Rev. Bd. 1986)(applicant's original financial proposal rejected), *review denied*, 2 FCC Rcd 7395 (1987), *aff'd by*

judgment, No. 88-1012 (D.C. Cir. April 24, 1989). To the extent that the ALJ's conclusions accepted Schultz's late amendments, and qualified Schultz on other than his *original* proposals, Comstock's exceptions are granted.

Comstock Ex Parte Issue

29. The ALJ concluded that the findings under the *ex parte* issue established that the letter written to the ALJ by Senator Hecht (reprinted *supra* note 3) constituted a prohibited *ex parte* presentation. The letter, the ALJ found, went beyond that of a mere status inquiry, and dealt with the merits of a matter *sub judice*. Further, the ALJ found, the Senator's letter to him enclosed a copy of Comstock's letter to the Senator which sought "help" on Comstock's behalf, while noting that "serious questions" existed pertaining to Schultz's application. *FSID*, para. 81. The ALJ also found that Comstock's violation of the *ex parte* rules was intentional as well as current; and, even if deemed to be an isolated event, was not entitled to mitigation because of its seriousness. *Id.*, para. 87. In concluding that Comstock's application must be denied, the ALJ emphasized that Comstock's principals, Messrs. Carroll and Akert, "were greatly less than candid and forthright" in refusing to acknowledge that an *ex parte* communication had taken place, even though the evidence established that Comstock attempted to point out the merits of its case and the flaws in Schultz's application. *Id.*, para. 94.

30. In its exceptions, Comstock argues that its two principals did not knowingly violate the Commission's *ex parte* rules, because they did not learn of the existence of the rules until counsel informed them of the FCC Managing Director's receipt of Senator Hecht's letter. Beyond this lack of awareness of the existence and substance of the Commission's *ex parte* rules, Comstock argues that neither of its principals intended to solicit an *ex parte* presentation, and their only objective was to determine how much longer this protracted proceeding was going to take. In this regard, Comstock denies that Carroll was aware that Ms. Judy Duke, to whom he spoke in Senator Hecht's office, intended to forward the Senator's letter to the presiding judge. Comstock further argues that the conduct of its principals was not so aggravated as to warrant disqualification, citing Commission and Board holdings in *Black Hills Video Corp.*, 1 FCC 2d 1222 (1965); *Country Broadcasting Co.*, 71 FCC 2d 1222 (Rev. Bd. 1979); *Moore County Radio Co.*, FCC 86-95, released March 3, 1986; *Charles R. Lutz*, 56 FCC 2d 385 (1975); and *Stearns County Broadcasting Co., Inc.*, 104 FCC 2d 688 (Rev. Bd. 1986), *rev. denied*, 3 FCC Rcd 2987 (1088). Specifically, Comstock maintains the record shows that the conduct in question is a single, isolated incident, which would ordinarily warrant no sanction, citing *Harold James Sharp*, 56 FCC 2d 708 (Rev. Bd. 1975), and is far less serious than the record in *Stearns County*, where a knowing and repeated violation of the *ex parte* rules resulted in dismissal, but not disqualification of the applicant. Finally, Comstock submits that the ALJ's adverse candor finding concerning its principals was not based on the hearing testimony, and was in fact contradicted by a finding (at Tr. 474) that Carroll had testified truthfully. Moreover, Comstock states, the ALJ made no demeanor findings to support his adverse candor conclusion. Comstock concludes that it should be found to be fully qualified.

31. In response to Comstock, Schultz maintains that there is no dispute as to the ALJ's findings under the *ex parte* issue, but only as to what conclusions should be drawn from them. In Schultz's view, not only was an *ex parte* presentation solicited, but following a conversation between Carroll and Ms. Duke, an *ex parte* communication was made. Schultz contends that Comstock had the burden of proof under the designated issue, but failed to meet it in any respect. Schultz also disputes a number of Comstock's specific contentions. For example, it challenges Comstock's claim that Carroll was not even trying to get the proceeding expedited, but only trying to find out how much longer it was going to take, by citing Akert's testimony that he wanted to see if anything could be done to expedite matters (Comstock Exh. 7; Tr. 362), as well as the testimony of William Farr, the head of Senator Hecht's Reno office, to the same effect (Joint Exh. 2, p.2). Schultz further disputes Comstock's claim that its principals had no idea that Senator Hecht would attempt to communicate with the presiding judge, citing Carroll's testimony to the effect that he discussed with Ms. Duke the identity of the judge presiding in the case to whom any inquiry would be directed (Tr. 465). Also, Schultz states that, despite Comstock's claim that its principals were ignorant of the *ex parte* rules, Carroll testified that he understood Comstock's conduct was wrong (Tr. 475). Finally, Schultz maintains that Comstock's disqualification was properly based on both its principals' evasive attempts to deny they had done anything wrong, even while contending that they sought no advice from counsel on the subject (Tr. 423), and because of their impermissible attempt to bring improper pressure to bear on the ALJ in this proceeding.

32. The historical purpose of the Commission's *ex parte* rules has always been very simple, that is, to ensure that its decisions are fair and impartial and based on a public record free of influence from non-record communications between decision-makers and outside persons. *Report and Order*, *Ex Parte Communications*, 2 FCC Rcd 3011, 3012 (1987). To this end, the Commission's Rules prohibit *ex parte* presentations – those not served on the parties (or, if oral, made without notice or opportunity to be present) – made to or from decision-making personnel in restricted proceedings. 47 C.F.R. 1.1202(b). Adjudicative proceedings that have been designated for hearing are restricted proceedings. 47 C.F.R. 1.1204(a)(1); 47 C.F.R. 1.1208(c)(1)(i). Any communications directed to the outcome or merits of a restricted proceeding are prohibited; however, inquiries relating solely to the status of a proceeding are permitted. 47 C.F.R. 1.1202(a). Nevertheless, "a status inquiry which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing of a proceeding" is prohibited. 47 C.F.R. 1.1202(a). Finally, no person may solicit or encourage others to make a prohibited *ex parte* presentation, 47 C.F.R. 1.1210, although the solicitation of purely status inquiries is not prohibited. *Ex Parte Communications*, *supra*, at 3013.

33. The resolution of any *ex parte* issue, and this case is no exception, always depends heavily on the particular facts and circumstances surrounding the alleged infraction. Our analysis must start, therefore, with the question of whether an *ex parte* presentation was, in fact, solicited

or encouraged by Comstock or made on its behalf. Our answer to this question, despite Comstock's denials, is in the affirmative.

34. Comstock's claim that its principals' only objective was to determine how much longer this case was going to take is contradicted by the plain language of the letters in question, as well as other record evidence. Thus, the April 18, 1988 letter from Comstock principal Robert Carroll to Senator Hecht (reprinted *supra* note 4), seeking his "help with a matter now pending before the Federal Communications Commission," contains adverse characterizations of its opponent in this case. It specifically asserts that "[o]n appeal to the FCC Review Board, we raised some very serious questions as to his [Schultz's] ability to own and operate a station" and that "we were expecting to get a favorable ruling from the Commission" prior to its decision "to let Mr. Schultz prove, what he says he was never allowed to prove, that he can run the station on a limited amount of capital by pre-selling commercial time . . . ." The Carroll letter further opines that "this is an already over-saturated market. Not only is the idea of preselling commercials impossible, but there are stations who have been on the air for several years still operating at a loss." Finally, Carroll states that he "would like to see where this action may be headed" and expresses appreciation for "any inquiries your office may be able to give to this matter." In fact, there is only token reference to how long the proceeding may take, or as to its current status. As such, it goes beyond the neutral solicitation of a status inquiry, which is the only form of solicitation permitted by our rules.

35. Moreover, the Commission has also clarified that a statement by a party that seeks to dramatize why the timeliness of Commission action is of special importance to it, or otherwise expresses an opinion on timing, is also improper. *Ex Parte Communications*, *supra*, 2 FCC Rcd at 3013. Thus, the April 18, 1988 letter's references to Schultz's qualifications in the context of Comstock's expectations of a favorable ruling from the Commission after six years of waiting, also appear to have gone too far. This impression is confirmed by Carroll's own testimony concerning why he thought it appropriate to comment to the Senator on Mr. Schultz's ability to own and operate a station (Tr. 447-449):

> I think we wanted to point up that we thought we had a very solid case. That this matter was twice . . . . turned back by the Review Board in our favor and that . . . I felt I needed to point that out what our good points were . . . instead of just writing a letter and saying please look into this matter. A little scenario, if you will, of the case . . . . [W]e raised what I thought were some very serious questions about Mr. Schultz's ability to own and operate the station . . . . I think I needed to give the Senator some background and putting us hopefully in a favorable position so that there would be some credence to that letter in his mind.

Carroll's purpose -- in his own words, putting his applicant in a favorable position -- was to "state or imply a preference for a particular party," to indicate "why timing is important to a particular party," and to "influence" or "address the merits or outcome," all in violation of 47 C.F.R. 1.1202(a). In sum, we agree with the ALJ that Carroll's letter intended to solicit an *ex parte* presentation on Comstock's behalf in this proceeding.

36. The second letter, that sent by Senator Hecht to Judge Tierney on April 22, 1988, was also improper. The letter, written after a telephone conversation between Carroll and Ms. Duke of Senator Hecht's office, not only enclosed a copy of Mr. Carroll's letter, but also volunteered the information to the judge presiding in this case that Comstock's opponent, Mr. Schultz, "applied for and was granted a license back in 1974 or 1975, but never put the station on the air." Ms. Duke testified that she learned the information regarding Mr. Schultz's prior authorization from Carroll, and that she thought this "might have some significance, since there seemed to be no reason for the FCC to grant another permit to someone who in the past had been granted one but had not built the station." (Joint Exh. 3, p.2.) While the Commission has long held that an inquiry to, or from, an elected official regarding administrative delay is permissible, *Fine Music, Inc.*, 8 FCC 2d 529 (1967); *Radio Laredo, Inc.*, 87 FCC 2d 353 (Rev. Bd.), *recon. denied*, 88 FCC 2d 901 (Rev. Bd. 1981), *rev. denied*, FCC 82-62, released February 3, 1982, *affirmed sub nom. Amigos Broadcasting, Inc. v. FCC*, 696 F.2d 128 (D.C. Cir. 1982), the Senator's letter went well beyond a mere status inquiry or complaint about delay, and it did comment negatively on Schultz. Thus, by its plain meaning and by Ms. Duke's open admission, this letter went to the merits of this case. As such, the second letter was an *ex parte* presentation made in violation of the Commission's Rules. The inclusion of a copy of Mr. Carroll's offending letter aggravated that infraction.

37. In its defense, Comstock makes much of its claimed lack of knowledge of the Commission's *ex parte* restrictions and of its overall innocence. These arguments are unavailing insofar as we conclude that an *ex parte* solicitation and presentation have been made here. To begin with, the Commission has always held that intent is irrelevant in determining whether a presentation has been made, *Ex Parte Communications in Hearing Proceedings*, 1 FCC 2d 49, 56 (1965); *Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847 (Rev. Bd. 1973), *review denied*, FCC 74-476, released May 8, 1974, and it is sufficient that an applicant intended to do the act in question, *i.e.*, write or solicit *ex parte* letters. Indeed, it is not necessary to show that an applicant knew it was violating the rules when the letters were written, because it is charged with knowledge of the rules and lack of knowledge will not entirely excuse the violations. *Desert Empire Television Corp.*, 88 FCC 2d 1413, 1417 (1982), and cases cited therein.

38. Furthermore, Comstock's claims of innocence are contradicted by its own testimony. On the one hand, Robert Carroll, in his written testimony, stated that although he had prior broadcast experience, he had no ownership experience and had not been involved in an FCC proceeding, that had he been aware of the rules he would have complied despite his feelings of frustration over the duration of the proceeding, that he only hoped Senator Hecht's inquiry might expedite matters, and that he did not anticipate that the Senator would write to the ALJ or attach his letter. (Comstock Exh. 6). At the hearing, however, Carroll conceded that he knew it would be wrong to ask the Senator to call the ALJ about the case. (Tr. 452-453). He explained that he occasionally has cof-

fee with a federal court judge and understands that it is wrong to discuss pending cases with judges. (Tr. 459, 466-467). Furthermore, Carroll's claim that he did not anticipate that the Senator's office would contact the ALJ is belied by his further testimony that he specifically discussed the identity of the ALJ with Ms. Duke in their telephone conversation (Comstock Exh. 6, p. 2; Tr. 465). Although Comstock claims that Ms. Duke already knew this information (Comstrock Br. at 12), Ms. Duke expressly testified that Carroll provided her with the pertinent information including to whom the letter should be sent (Joint Exh. 3, p. 2). On the basis of this evidence, we reject Comstock's claim that its principals' actions were wholly innocent and unintentional.

39. Comstock's ultimate contention is that even if its principals have transgressed -- and we believe the record indicates that they did solicit an *ex parte* presentation to a decision-maker in an attempt to influence the outcome of the proceeding -- no severe sanction should be imposed here. Any party who is found to have violated or caused to be violated the Commission's *ex parte* rules is subject to disqualification or other sanction "as may be appropriate." 47 C.F.R. 1.1216. In considering what may be appropriate, we point out that intent, while not a factor in determining whether a presentation has been made, is pertinent in weighing whether (and what) sanction is called for. *Voice of Reason, Inc., supra*, at 708-709. In this regard, Comstock's reliance on such cases as *Country Broadcasting Co.*, and *Moore County Radio Co., supra*, is unavailing, because they involved either a letter not intended to be sent to a decision-maker or a solicitation not intended to influence the proceeding, neither of which circumstance perfectly corresponds to the record in this case. Similarly, Comstock's reliance on *Black Hills, supra*, which emphasized that "surreptitious efforts" to influence the Commission were not in evidence, is not determinative because all *ex parte* communications are, by definition, secretive to some extent. *Charles Lutz, supra*, on the other hand, indicates that unfamiliarity with the Commission's rules mitigates the inference of a culpable intent, and here there is a claim, here unrebutted, that Comstock's principals did not know of the specific *ex parte* prohibitions. The impact of this factor is at least partly offset, however, by other evidence indicating that Carroll understood that it was wrong to approach a hearing judge in a pending case.

40. Comstock's strongest argument, in terms of precedential support, is that its infraction was an isolated event. The Commission, and hence the Board, have held that where an *ex parte* violation is a single incident, and not repeated, no severe sanction will follow. *Smaller Market UHF TV Stations Group*, 81 FCC 2d 429, 439-440 (1980); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 1027-1028 (Rev. Bd. 1982); *Harold James Sharp, supra*, at 709.[41] In this regard, while Comstock's letter to Senator Hecht resulted in a second letter being sent to the ALJ, there was essentially only one transaction involving a solicitation of assistance from a single Senatorial office. By contrast, for example, in *Voice of Reason, supra*, the applicant's disqualification under the *ex parte* issue was based on a solicitation sent to thousands of persons on his mailing list. Similarly, in *Desert Empire Television Corp., supra*, the Commission imposed only a modest monetary forfeiture where a licensee engaged in wilful *ex parte* communications on at least three separate occasions and where the violation was repeated after warning, and even after having been informed specifically concerning the Commission's *ex parte* rules. And, in our most recent decision in this area, *Stearns County Broadcasting Co., supra*, where the applicant made numerous oral and written solicitations of *ex parte* assistance from her two United States Senators and her Congressional Representative, leading the Board to conclude that the rule violations were wilful and repeated, the applicant was not disqualified. We pointed out that our milder dismissal sanction in that case was based on the fact that the *Stearns County* applicant had previously violated the *ex parte* rules in connection with a prior FM application, and had been expressly warned by the Commission that future violations would not be countenanced. *Id.*, at 690.

41. Against the backdrop of pertinent precedent,[42] we conclude that Comstock here engaged in the solicitation of an *ex parte* presentation in circumstances that strongly suggest that its behavior was not entirely innocent or unintentional, but the infraction was not repeated and not made in the face of specific knowledge of the Commission's rules or prior warnings that such conduct was unacceptable. While we believe the violation was a palpable one, and have therefore evaluated it in some detail, we conclude, based largely on the results reached in *Desert Empire* and *Stearns Country, supra*, that its conduct falls this side of requiring imposition of a sanction. In so holding, however, we trust that Comstock's principals, chastised by their experience in this case, will not again seek to improperly advance the outcome of a proceeding to which they may be parties at this Commission.[43,44] Should they do so, there is no doubt that an appropriate sanction will follow.

CONCLUSIONS

42. For the reasons expounded above, we must set aside the *FSID* conclusion that Schultz was basically qualified to acquire a broadcast Construction Permit when he filed his application. The key, perhaps, to the lack of resources behind his application is suggested at *FSID*, para. 18, where the ALJ records Schultz's concession that "he did not think he would be going through a hearing with a competing applicant (Schultz Deposition Tr. 42)." On the other side of the coin, Schultz's attorney furnishes us the answer to the collateral question of how Schultz's facially incredible proposal could have emerged unscathed from the FCC application "processing line."

> [Schultz Counsel]: It has not been my experience that the staff spends a lot of time reviewing the financial and staffing proposals.

Tr. of Oral Arg. of July 21, 1989 at 504. So we have noticed ourselves.

43. Indeed, in our previous *Board Decision*, we orated:

> This case, while perhaps a fluke, does nevertheless illuminate the downside risks of a much simplified application process, through which channels occasionally slip those without the barest ability to construct and operate a full power broadcast station, let alone possessing the considerable resources requisite to serving the American public in the manner to which it has become accustomed.

103 FCC 2d at 1063. Schultz, of course, filed his subject application at the grand debut of the Commission's prior revision of FCC Form 301, which had eliminated the requirement for an itemized cost estimate, and permitted an applicant to merely "certify" as to its financial ability (by checking a box), without submitting supporting documentation. These lacunae in the 1981 application form revision (amongst other deficiencies) wreaked subsequent havoc on our application and hearing processes, as attested by the Commission's April, 1989 revision of Form 301, once again, to reimpose most of its pre-1981 requirements. *See supra* para. 21.

44. As the record at hand exhibits clearly, Schultz filed here without much realistic preparation; and he has not -- in at least two rather generous attempts -- demonstrated by a preponderance of the record evidence that his initial staffing or financial proposals had any more plausibility than had been reflected on their face. Furthermore, to the degree that the *FSID* conclusions on Schultz's relevant proposals incorporated his exceedingly late amendments, despite Schultz's plain failure to meet the six-point "good cause" test, they must be modified. Pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), the cognizable record leaves Schultz unqualified for this Construction Permit.

45. Obviously consternate with "the seeming infinity of this epic," *FSID* at para. 89, Comstock's Bob Carroll was agitated to violate one of the cardinal strictures of our adjudicatory conventions when he sought the supervention of a U.S. Senator, after the Commission remanded this case for yet a second supplemental hearing. The law views very darkly indeed transgressions of the APA's *ex parte* provisions, 5 U.S.C. § 557(d). *See WKAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 841; *Amigos Broadcasting, Inc. v. FCC*, *supra*. We find that Carroll solicited and abetted an *ex parte* contact in this case, and that Senator Hecht's letter to the ALJ, which appended Carroll's own letter commenting on the merits of Schultz's application, was a prohibited *ex parte* contact. In our *Stearns County* decision, we reviewed the sanctions applied by the Commission in its more current *ex parte* cases and found that no recent applicant had been found wholly unqualified to be a licensee, including those cases involving "willful and repeated" violations of the *ex parte* rules. *See, e.g., Charles Lutz, supra*. Even in *Stearns County*, where the licensee-applicant had violated the *ex parte* rules in connection with a preceding broadcast application, and the Commission had expressly warned that licensee that a repeat performance would result in a severe administrative response, the Board regarded itself as constrained against total disqualification of that licensee, by dint of recent Commission case precedent. The Commission denied review of our *Stearns County* decision, thus ratifying our declination to disqualify the offending applicant for licenseeship. On the less egregious facts of this case, we believe that the ALJ's disqualification of Comstock runs afoul of contemporary Commission precedent. And, as this is a first offense, we find that *Stearns County* is not a predicate for the still milder sanction of dismissing Comstock's application without a fatal disqualification. *But see note* 44, *supra*. Because Comstock's application remains the only qualified one before us, it must necessarily prevail.

46. ACCORDINGLY, IT IS ORDERED, That the application of Comstock Broadcasters, Inc. (File No. BPH-820628AQ) for a Construction Permit for a new FM broadcast station at Sparks, Nevada is GRANTED, and the application of Pepper Schultz (File No. BPH-820519AK) is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Counsel for Comstock did not appear at oral argument, claiming a scheduling conflict. Counsel for Schultz did appear and argue on Schultz's behalf.

[2] Schultz's amended financial proposal relied upon an alleged 1985 "gift" of $101,000 from Schultz's brother and sister-in-law, about which the ALJ wrote:

> Whatever the nature of the origins and metamorphoses from loan to unqualified gift from a sibling donor, the $101,000 appears unqualifiedly available and also appears fully adequate to underpin his financial qualifications with a sizeable cushion of approximately $22,000.

Supplemental Initial Decision, 103 FCC 2d at 1077. The Board, however, found this last-minute gift to be dubious, at best, and held that a hearing as to its legitimacy would be required before it could be credited. *Board Decision*, 103 FCC 2d at 1060-1061 & n.9. The full Commission explicity agreed with that assessment, *see Comm'n Decision*, *supra* para. 6.

[3] The full text of Senator Hecht's letter to Deputy Chief Administrative Law Judge James F. Tierney (reprinted in *FSID* at para. 48) reads as follows:

> Dear Mr. Tierney:
>
> Enclosed is a copy of the correspondence I received from Bob Carroll regarding his interest in determining the status of his application pending before the FCC for a new Sparks FM radio station allocation under the name of Comstock Broadcasters. Their docket number is 83-1207, BPH-820628AQ, and they are in opposition in this case with Pepper Schultz, docket number 83-1207, BPH-820628AQ [sic]. I would appreciate any information you could provide regarding this matter.
>
> It is my understanding that Mr. Carroll's opposition in this application, Pepper Schultz, applied for and was granted a license back in 1974 or 1975, but never put the station on the air. Mr. Carroll further advises me that this case has been referred back to you by the Review Board. Please forward your reply, in duplicate, to the attention of my Constituent Service Representative, Judy Duke, 300 Booth Street, Suite 2014, Reno, Nevada 89509. Please refer to the above named constituent in all correspondence regarding this matter.
>
> Sincerely,

Chic Hecht

[4] The full text of Bob Carroll's letter to Senator Hecht (reprinted in *FSID* at para. 47) reads as follows:

Dear Senator Hecht:

I am writing to see if your office could be of any help with a matter now pending before the Federal Communications Commission. In 1982 I filed for a new Sparks FM radio station allocation. The name of my corporation is Comstock Broadcasters. I hold 51% of the stock and Ben Akert holds 49%. Our opposition in this case is Pepper Schultz who resides in Sparks.

The original hearing Judge granted the application to Mr. Schultz. On appeal to the FCC Review Board, we raised some very serious questions as to his ability to own and operate a station. On two occasions the Review Board agreed with our objections to his qualifications.

We were expecting to get a favorable ruling from the commission this year but now the commission has once again thrown the matter back to the original Judge. The reason was apparently to let Mr. Schultz prove, what he says he was never allowed to prove, that he can run the station on a limited amount of capital by pre-selling commercial time, and by getting his friends to work for free.

Senator, as you may or may not know this is an already oversaturated radio market. Not only is the idea of pre-selling commercials impossible, but there are stations who have been on the air for several years still operating at a loss. We simply, after six years, would like to see where this action may be headed. Any inquiries [sic] your office may be able to give to this matter would be greatly appreciated by both Ben and myself.

If your staff should have any questions please tell them to give me a call. Thank you for your attention to this problem and Good Luck in your upcoming campaign.

Regards,

Bob Carroll

[5] The full text of the FCC Managing Director's letter to Senator Hecht (reprinted in *FSID* at para. 49) reads as follows:

Dear Senator Hecht:

Thank you for your letter of April 22, 1988, to Deputy Chief Administrative Law Judge Tierney, requesting information on the referenced proceeding and enclosing a letter from your constituent, Bob Carroll.

Your letter was forwarded to my office for reply in keeping with the Commission's *ex parte* rules dealing with written communications relative to "restricted" proceedings under consideration by the Commission.

Administrative Law Judge Tierney released a Memorandum Opinion and Order (MO&O) in the proceeding of May 4, 1988. A copy of that MO&O is being provided to you with this letter. I believe that the MO&O will provide you with the information you requested.

In accordance with FCC rules as found in 47 CFR §1.1212(d), I am, by copies of this letter, providing notice and disclosure of your communications to all parties to this proceeding. Additionally, this letter and your communication will be placed in public file associated with (but not made a part of) the record in the proceeding.

Your interest in this proceeding is appreciated. If I can be of further service to you in this regard, please feel free to call upon me.

Sincerely,

Edward J. Minkel

Managing Director

Enclosure

cc: Herbert D. Miller, Esquire

David M. Hunsaker, Esquire

[6] *FSID* at para. 8.

[7] *Id.*, at para. 9.

[8] *Id.*, at para. 10.

[9] *Id.*, at para. 11.

[10] *Id.*; *see also id.*, at para 13 ("Schultz had not asked any [volunteers], prior to filing his application, if he could rely on them if he needed help").

[11] *Id.*, at para. 16.

[12] *Id.*, at para. 11.

[13] *Id.*, at para. 12.

[14] *Id.* It is not clear whether Way's possible help was to be confined to "advice in such construction" (*see id.*).

[15] *Id.*, at para. 17.

[16] *Id.*, at para. 18.

[17] *Id.*

[18] *Id.*

[19] *Id.*, at para. 19.

[20] *Id.*

[21] *Id.*

[22] *Id.*, at para. 21.

[23] Comstock Exceptions at 34-37.

[24] *Id.*, at 30-32.

[25] *Id.*, at 35-36. *Compare also FSID*, para. 18 (Schultz aware of ATS rule prior to filing) *with id.*, para. 20 (Schultz learned of ATS rule from counsel after hearing).

[26] Schultz Reply at 15-23.

[27] *Id.*, at 22.

[28] The point was also made, rather trenchantly, in our prior *Board Decision* that even if Schultz had used an ATS system that was no panacea, since no individual could conceivably fulfill all of the other vital tasks necessary for the succesful operation of a commercial FM station, particularly in the impossible conditions Schultz envisaged. *See* 103 FCC 2d at 1063-1065 & n.14. ATS or not, the proposal was ludicrous.

[29] Comstock Exceptions at 31 (quoting Schultz Remand Submission, Statement of Pepper Schultz, p.9).

[30] The ability to constuct the proposed broadcast facility, and to operate the station for three initial months *(without counting any potential advertising revenue)* is the Commission's minimum financial standard. *Financial Qualifications Standards for Aural*

Broadcast Applicants, 69 FCC 2d 407 (1978); *see also GACO Communications Corp.*, 94 FCC 2d 761, 781 & n.72 (Rev. Bd. 1983), *aff'd*, FCC 84-212, released May 14, 1984.

[31] Comstock Exceptions at 17.

[32] *Id.*, at 20-22.

[33] *Id.*, at 25-27.

[34] Schultz Reply at 16.

[35] *Id.*

[36] It is ironic that the *Merrimack Valley* Commission based its relaxation of its equipment leasing showing on the fact that it was then (1980) in the process of reducing its overall financial showing requirements, *see* 82 FCC 2d at 168, a deregulatory thrust the Commission was recently moved to reverse. *See Revision of Application for Construction Permit for Commercial Broadcast Station, supra* para. 21. Among other things, the Commission will again require a full financial resource disclosure, including a discussion of any credit extension. 4 FCC Rcd at 3868 n. 68.

[37] Schultz Reply at 20.

[38] For an extended discussion of the several reasons why the Commission imposes a strict, 6-point "good cause" test on post-hearing designation amendments to applications, *see Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 215-217 (Rev. Bd. 1984) (subsequent history omitted).

[39] At *FSID*, para. 73, the ALJ states that the alterations in Schultz's staffing proposals were made "in response to changing conditions." There is no further discussion of the nature of these "changing conditions," although the ALJ strongly suggests elsewhere that a succession of appointments with Dr. Reality were the sole reason. *See, e.g., id.*, at paras. 73, 96.

[40] Schultz Reply at 15-16.

[41] In *Sharp*, the Board suggested a comparative demerit might be appropriate. This remedy, of course, is no longer available to us, *see Character Qualifications*, 102 FCC 2d 1179, 1230-1232 (1986); *Broadcast Associates of Colorado*, 104 FCC 2d 16, 17-19 & nn. 4, 5 (1986). Even if we could have levied a *comparative* demerit here, Schultz's disqualification would make such a demerit moot.

[42] We have not omitted from our consideration the court's holding in *Amigos Broadcasting, Inc. v. FCC, supra*, which focused, however, on oral communications, which are not present on this record.

[43] There is a disagreement in the parties' contentions regarding the impact of the ALJ's finding at *FSID*, para. 94, that Comstock's principals were "less than candid and forthright" in denying that an *ex parte* presentation occurred. Were this a credibility finding based on the ALJ's observation of the witnesses, it might, of course, be entitled to significant deference. *Catoctin Broadcasting Corp.*, 2 FCC Rcd 2126, 2127 (Rev. Bd. 1987); *Telestar, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987). The FSID does not contain specific demeanor findings and the ALJ's language, albeit susceptible of more than one interpretation, appears more in the nature of a rejection of Comstock's legal position rather than a true credibility finding based on witness demeanor. This impression is reinforced by the ALJ's specific transcript comment (at Tr. 474) that Robert Carroll had "answered the questions on cross-examination I think honestly for [Schultz' counsel]." Nor, we note, did the ALJ designate a lack of candor/misrepresentation issue, generally a prerequisite for a valid finding of intentional deception. *See generally West Coast Media, Inc. v. FCC*, 695 F.2d 617 (D.C. Cir. 1982). Finally, there is no further reference or negative finding in the *FSID* pertaining to Comstock's principals' truthfulness and reliability which would raise a sufficiently substantial and material question as to that applicant's qualifications to be a Commission licensee. *Cf. Rockledge Radio, Ltd.*, FCC 89R-39, released June 26, 1989, and cases cited therein.

[44] The Board Chairman does not join in note 43, above, because he agrees with the ALJ's remarks that Comstock's principals were "less than candid and forthright." First, he feels that Comstock attempted to shade the fact that it, not the Senator's staff, specifically targeted the ALJ for political pressure, not only to expedite the case, but about the merits of the applications. *See supra* paras. 34, 36 and 38. Second, the Board Chairman believes that Comstock was less than candid in continuing to insist that it was unaware that its *ex parte* solicitation was wrong, despite the fact that Carroll's past contact with a federal judge had taught him that it was wrong to discuss pending cases with judges. *See supra* para. 38. "He who engage[s] in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding." *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961), *cert. denied sub nom. Public Service Television, Inc. v. FCC*, 368 U.S. 841. Since the *ex parte* violation in this case was aggravated by less than candid testimony about that matter (the Board Chairman believes), the Commission, which has plenary authority over its precedents, is free to find that this case is as egregious as *Stearns County, supra*, and to dismiss Comstock's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-14

In the Matter of

Amendment of Part 2	RM-4829
of the Commission's Rules	RM-4831
Regarding the Allocation of	RM-4983
the 216-225 MHz band.	

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1989; Released: August 17, 1989

By the Commission:

INTRODUCTION

1. The Commission hereby reaffirms the action taken in the August 4, 1988, *Report and Order* in this proceeding.[1] In that action the Commission: 1) maintained the existing 216-220 MHz band allocation; 2) allocated the 220-222 MHz band on a primary basis to the land mobile service for both government and nongovernment operations; and 3) allocated the 222-225 MHz band on a primary basis to the amateur service. This *Memorandum Opinion and Order* responds to petitions for reconsideration filed by the American Radio Relay League, Inc. (ARRL), the National Communications System (NCS), TV Answer, Inc. (TVA) and a number of amateur radio organizations and individual amateur radio licensees.

BACKGROUND

2. The 216-225 MHz band has long been used on a primary basis for federal government radar operations with the amateur service allowed access to the 220-225 MHz portion on a secondary basis. However, it was determined in the proceedings of the 1979 World Administrative Radio Conference (1979 WARC) that this band would no longer be used for radar operations. Therefore, the government began phasing-out these radar operations, making the 216-225 MHz band available for other purposes. In 1981, the Commission allocated the 216-220 MHz portion of this band for maritime mobile operations. In 1983, the Commission allocated the 220-225 MHz portion on a primary basis to the amateur, fixed and mobile services.[2] The Commission noted, however, that there were still outstanding allocation issues in this band and that the government continued to have spectrum requirements for part of this band. Therefore, it stated that a future allocation proceeding addressing all of the remaining issues of this portion of the band would be necessary. Subsequently, the Commission received three petitions for rule making requesting allocations in the 216-225 MHz band.[3] The Commission then initiated General Docket No. 87-14 to address these issues by adopting a *Notice of Proposed Rule Making* (*Notice*) in this proceeding on February 2, 1987.[4]

3. The Commission considered a variety of factors in reaching the decisions in the *Report and Order*. Among these factors were the need to provide for narrowband land mobile operations, the impact on existing amateur use, the potential for interference to TV broadcasting and the actions of the 1979 WARC. The Commission concluded that the public interest would be best served by providing dedicated spectrum for the development of narrowband, spectrum efficient, land mobile technologies. This was based on the belief that such spectrum efficient technologies would play a vital role in meeting the future requirements of the land mobile services.

4. With regard to the amateur service, the Commission stated in the *Report and Order* that it was particularly sensitive to the needs and concerns expressed by the amateurs. The Commission noted that the amateur service is vitally important to promote the development of individuals schooled in the radio art, to advance radio technology, and to provide public service, particularly in times of emergencies. Further, the Commission noted the valuable contributions the amateur service has made over the years and stated that it will continue to support this service.

5. The Commission concluded that allocating three megahertz in the 222-225 MHz band to the amateur service on a primary basis, together with the other bands allocated to the amateur service, should continue to provide adequately for this service.[5] The Commission noted that amateur bands are located throughout the spectrum and provide for all types of communications. Further, the Commission noted that a number of these bands support amateur operations similar to those on the 220-222 MHz band. Specifically, the amateur service has allocations in the 28-29.7 MHz, 50-54 MHz, 144-148 MHz, 222-225 MHz, 420-450 MHz, 902-928 MHz and 1240-1300 MHz bands. With regard to emergency communications, the Commission stated that hundreds of channels will remain available for amateur use. It concluded that this should adequately meet the communication requirements of any emergency or natural disaster.

6. *Petitions for Reconsideration*. The Commission received a number of petitions for reconsideration. All the petitions, except the petitions from the NCS and TVA, are from amateur interests and request that the Commission reconsider its decision to allocate the 220-222 MHz band to the land mobile service. The petition from the NCS also supports the amateur's continued use of the entire 220-225 MHz band. Approximately 700 individual amateurs filed petitions for reconsideration, with about 525 of these from amateurs in California.[6] TVA's petition requests the Commission to reconsider its decision to the extent that the allocation precludes the grant of TVA'sw Petition for Rule Making, RM-6196, which seeks a fixed allocation of one-half megahertz in the 216-222 MHz band for a television viewer-response service.[7]

7. Oppositions to the petitions for reconsideration were filed by the Association of American Railroads (AAR), the ARRL, Forest Industries Telecommunications (FIT), the Land Mobile Communications Council (LMCC), SEA, Inc. (SEA), TVA, United Parcel Service (UPS), Utilities Telecommunications Council (UTC) and Waterway Communications Systems, Inc. (WATERCOM). All the oppositions, except the ARRL's, argue that the

Commission's decision was well reasoned and should be affirmed. They state that all of the issues raised in the petitions were fully addressed in the *Report and Order* and that no new substantive information was provided that would justify reconsideration of the *Report and Order*. The issues raised in the other petitions for reconsideration are discussed below, as well as the TVA Petition for Rule Making.

DISCUSSION

8. *Need for Land Mobile Allocation*. In their petitions for reconsideration the ARRL and other amateur interests contend that there is no need to allocate additional spectrum for land mobile service. They state that the future spectrum requirements of the land mobile service are undefined and unquantified. Further, they contend that if the Commission changed its rules to permit trunking, packet, digital and cellular technology in existing land mobile bands, there would be no need for additional spectrum for the land mobile service. The ARRL also argues that the *Report and Order* failed to address the Field Operations Bureau (FOB) 1985-86 studies of spectrum occupancy in the 800 MHz land mobile bands. The ARRL maintains that these studies reveal that nationally, 66% of assigned channels in that band are unoccupied. According to the ARRL, since the 800 MHz band is the newest of the land mobile allocations, it may reasonably be presumed that paper loading is a significant factor in the 30-50 MHz, 150 MHz, and 450 MHz land mobile allocations as well. The ARRL argues that no additional land mobile allocations should be considered until the issues raised by this study are resolved through further study of existing band occupancy.

9. We wish to emphasize that the allocation of the 220-222 MHz band to the land mobile service was driven by the need to provide spectrum for development of spectrum efficient land mobile technology. We note that the demand for land mobile service has grown consistently for many years and we see no reason why this would change in the foreseeable future. Recognizing this, the Commission believes that an important ingredient in the long-term solution to accommodating land mobile growth is through the implementation of spectrum efficient technologies.

10. In the *Report and Order* the Commission noted the need to provide an allocation that would dedicate spectrum for the development of narrowband land mobile technologies.[8] The Commission stated that spectrum efficient technologies will be essential in addressing this country's future land mobile requirements. Further, the Commission stated that in order for narrowband land mobile technology to flourish, it must be afforded a reasonable opportunity to gain full acceptance in the market place. We believe this is still true and are not persuaded by the petitions for reconsideration that narrowband technologies will not be necessary to meet future requirements. The Commission did note, however, that narrowband technology is not the only spectrum efficient technology that might be applied to land mobile services. In fact, the Commission is providing for other spectrum efficient technology such as trunking and digital as suggested by the ARRL.[9]

11. We note that providing spectrum for the development of narrowband land mobile technology is in some ways similar to the Commission's actions in the late 1970's when it allocated spectrum for the land mobile service in the 800 MHz band for the development of trunked technology. Implementation of trunking technology was slow to develop. However, today trunking is widely recognized as a means for improving spectrum efficiency and we are examining ways to implement this technology in existing lower-frequency land mobile bands.

12. Several other important factors entered into the Commission's decision as elaborated in the *Report and Order*. We noted that the 1979 WARC allocated the 220-225 MHz band on a co-primary basis to the amateur, land mobile and fixed services. Land mobile users expressed interest in implementing the international land mobile allocation in the United States. The Federal Government, which prior to the 1979 WARC had been the primary user of this spectrum in the United States, advised it had a requirement to use part of this spectrum for narrowband land mobile operations. Further, current provisions for narrowband land mobile systems have proven to be an impediment to the development of this spectrum efficient technology. A dedicated band of contiguous spectrum is required. Other spectrum alternatives are not viable as they would continue to severely handicap development of this technology. The Commission noted that amateur use of the 220-225 MHz band is light. This appeared in part to be due to the long unsettled amateur allocation in this band.[10] We hoped to resolve this by granting a primary allocation to the amateur service of 60% of the band. All of these factors lead us to conclude that the allocations made in the *Report and Order* were in the public interest.

13. In regard to the FOB monitoring study referenced by ARRL, we do not believe it is necessary for our purposes here to resolve issues pertaining to this study. As stated previously, we are focusing on long-term and not immediate requirements. We note, however, that several of the oppositions to ARRL's petition point out that the land mobile community had vigorously challenged the FOB study. Among the arguments raised by the land mobile community was that the FOB study was conducted shortly after the 800 MHz band was opened up for land mobile use. They contend that many licensees were still in the process of constructing stations and were not yet operating when the study was made. In any event, we cannot conclude after many years of growth in the land mobile service, that this service, will not continue to grow in the future. Nor can we conclude that there is no pressing need to foster spectrum efficient land mobile technology.

14. *Spectrum Alternatives*. Amateur interests argue that the Commission failed to adequately investigate spectrum alternatives to the proposed land mobile allocation. Some amateurs contend that insufficient analysis was performed to conclude that use of the 30-50 MHz and 216-220 MHz band is unworkable for narrowband land mobile technology.[11]

15. In the *Report and Order* the Commission addressed alternative bands to the 220-222 MHz band to provide spectrum for the development of narrowband technologies.[12] After reviewing all of the alternatives and related issues the Commission still believes that existing land mobile bands would not allow narrowband technologies to fully develop due to current use and channeling plans. Further, such reallotments would entail severe costs to a large number of users as well as potentially having a detrimental impact on safety services, such as the police

and fire service.[13] Further, the geographic limitations on land mobile operations in the 216-220 MHz band necessary to protect broadcast TV channel 13 operations would be so restrictive that this spectrum would provide little opportunity for land mobile operations in most major metropolitan areas. In this regard, we note that the maritime mobile service in the 216-220 MHz band has restrictions on operations that are within 105 miles of a TV channel 13 operation.[14] Similar mileage restrictions would be required of land mobile operations which would rule out such operations in most major urban areas. No new information has been presented that leads us to different conclusions.

16. *Efficiency of Narrowband Technology*. Amateur interests argue that narrowband technology will not improve spectrum efficiency significantly. The ARRL cites a June 1988 CCIR Doc. 1/105-E report, on the spectrum efficiency of narrowband modulation techniques. The ARRL states the paper concludes that narrowband technology is no more than 2.5 times as spectrum efficient as conventional frequency modulation (FM) technology even under the best real-world circumstances. It argues further that, according to the report, when a large adjacent channel signal protection ratio is required, such as in congested environments, the spectrum efficiency of narrowband FM is commensurate with that of amplitude companded single sideband (ACSB). The ARRL states that this is new information that came to light after the comment deadline. However, the ARRL believes the Commission should have been aware of and considered this information due to its participation in the review of CCIR papers.

17. As an initial matter, we point out that issues concerning the specific narrowband modulations that will be employed in this band will be addressed in a subsequent proceeding. In any event, we do not view spectrum efficiency improvements on the order of 2.5 as insignificant. We also note that the CCIR report cited by ARRL also states that "Improvements in transmitter linearity and pilot carrier processing appear feasible in this relatively young ACSB technology." As a result substantial spectrum efficiency improvements may be possible even in crowded radio environments. We find no new information that causes us to alter our previous finding that narrowband technology is viable and shows promise for improving spectrum efficiency in the land mobile service.

18. *Amateur Use of the 220-225 MHz band*. Amateur interests argue that the Commission failed to take steps to collect meaningful information to determine amateur use of the 220-225 MHz band. They suggest that the Commission should have contacted amateur frequency coordinators or conducted monitoring of the band. Further, they contend that the Commission disregarded the many comments filed by amateurs that included information on use of the band. The ARRL submits excerpts of several amateur comments that it believes were ignored in developing the decisions in the *Report and Order*. Amateurs also fault the Commission for using the ARRL *Repeater Directory* to determine the number of repeaters in this band. Amateurs contend that the *Repeater Directory* is incomplete. Additionally, they assert that the Commission misused the *Repeater Directory* to determine that the 220 MHz band is lightly used. Amateurs state that many operations conducted in the 220-222 MHz band, such as control and auxiliary links, weak signal operations, and Earth-Moon-Earth operations, are not listed in the *Repeater Directory*.[15]

19. The ARRL also argues that the statistics it provided, showing that there are 773 fixed stations (*i.e.*, control and auxiliary links) and 1106 weak signal operations in the 220-222 MHz band, were not complete. The ARRL indicates that this was last-minute data gathered from frequency coordinators to establish that there is a significant number of such operations that would be displaced. According to the ARRL, accurate numbers could not have been obtained in the time available. The ARRL asserts that the *Report and Order* falsely assumes these numbers to be final figures to bolster the conclusion of light usage by the amateurs. The ARRL and other amateur interests state that the Commission has erroneously averaged the numbers throughout the United States, when in fact the use is concentrated in metropolitan areas.[16] The ARRL states that, contrary to the Commission's assumption that control links are placed one per channel, sixteen or more links are coordinated per channel, per geographic area.

20. There has been ample time for interested parties, including the ARRL, to collect statistics on amateur use of this band. The petitions in this proceeding were submitted 4 years ago and our *Notice of Proposed Rule Making* in this proceeding was issued 2 years ago. The Commission relied primarily on the information submitted by ARRL, which is a principal spokesman for the amateur community. The ARRL in fact indicated that it had collected this information by contacting amateur frequency coordinators. Comments filed by individual amateurs were of little value for determining statistics on overall use of the band. The preponderance of the comments filed by individual amateurs indicated a general objection to any reduction of amateur spectrum. In most instances, individual amateurs gave no indication of whether they actually use the 220-225 MHz band themselves. Further, most of the comments that did indicate use of the band were vague. We were rarely able to determine whether the use was for fixed operations such as control channels or for repeater operation, and whether the frequencies used were above or below 222 MHz.

21. We continue to believe, as stated in the *Report and Order*, that the principal use of the 220-225 MHz band is for repeater operations. We also still believe the *Repeater Directory* is a reasonably accurate reflection of repeater use of this band. We conclude that the Commission's comparison of repeater use of this band with the 144-148 MHz amateur band, where there are four times as many repeater operations, was appropriate in determining that the band can accommodate additional use.[17] In the almost 700 petitions for reconsideration, only two provided information on unlisted repeaters. The Oregon Region Relay Council, Inc. (ORRC) and the Portland Amateur Radio Club, Inc. (PARC) state that there are only 8 repeater listings in the *Repeater Directory* for Oregon, but their data base shows 15 coordinated repeaters in the state.[18] They contend that the *Repeater Directory* is in error by a similar percentage throughout the United States. There is no evidence to support this hypothesis. Further, we believe the information from ORRC and PARC supports the conclusion of the *Report and Order* that the 222-225 MHz band will be able to support amateur operations in most parts of the country. In this regard we note that the amateur band plan lists 54 pairs of repeater frequencies in the 222-225 MHz band. There-

fore, all of Oregon's repeaters could have their own assigned pair of frequencies, with 39 channel pairs still vacant for new repeater operations. Another 42 unpaired channels would still be available for other operations such as control links and packet radio.

22. The Commission recognized in the *Report and Order* that operations such as control and auxiliary links were not listed in the *Repeater Directory*. However, information on these and other operations was contained in the ARRL comments. While the ARRL states that its statistics on such operations were incomplete, no new information or update has been submitted. We conclude that the ARRL information, while it may be incomplete, is the best available estimate of such operations and that it was appropriate for the Commission to rely on this information in evaluating the use of the band.

23. We also believe that monitoring of amateur use of this band by the Commission would be irrelevant. No party in this proceeding has argued that the 220-225 MHz band is congested in terms of the communications traffic carried in the band. In fact, a number of amateurs state that they find the band attractive because it is not congested. The amateur arguments concerning this band have been couched in terms of the number and types of transmitters. In essence, we have assumed that every transmitter listed by the amateurs is fully used. We would not expect this to be the case in practice. Thus, if anything, monitoring would be expected to show less use than we have assumed.

24. Much of the argument in the petitions centers on whether the current operations in the 220-222 MHz band can be reaccommodated in the 222-225 MHz band. In the *Report and Order*, the Commission noted that the ARRL band plan already provides allotments for fixed and experimental operations in the 222-225 MHz band. The Commission stated that, with the possible exception of a few areas, frequencies were available in the 222-225 MHz band. The Commission stated that it appeared the fixed and experimental operations of the 220-222 MHz band may be reaccommodated in the 222-225 MHz band.

25. Amateurs, particularly those from California, argue that it will not be possible to reaccommodate the operations currently in the lower part of the band because the upper remaining band is already fully used. They claim that the provisions in the band plan for non-repeater operations above 222 MHz have been ignored and instead repeaters have been assigned to these frequencies. They state that in California the only alternative is to completely reorganize all the frequencies currently used in the upper band segment.[19] The amateurs claim this will entail hundreds of hours of time to accomplish, will be costly, and even then will not accommodate all the operations of the lower segment. Further, many amateurs argue that control of repeaters in other amateur frequency bands, as well as repeaters in the 222-225 MHz band, is accomplished through use of frequencies in the 220-222 MHz band.[20] As an example, a number of commenters referenced the Condor network, which is a repeater network that runs through California and parts of Nevada and Arizona, and uses a frequency in the 220-222 MHz band.[21] They contend that this network, which is considered vital for communications during emergencies such as earthquakes, will be lost as a result of the Commission's actions.

26. We continue to believe that it will be possible to reaccommodate the operations from the 220-222 MHz band to the 222-225 MHz band. This is founded on a number of factors. In most areas of the country vacant channels are already available. We deduce this from the fact that in most states the number of repeaters listed do not approach the number of channels in the 222-225 MHz band. In urban areas where there are more operations than channels, more efficient use of the spectrum will have to be made. We note this is a similar problem that is faced by many other radio services in urban areas. One of the primary ways other services accomplish more efficient use of the spectrum is by increasing reuse of frequencies. They accomplish this with some planning and by reducing power to the minimum required for communication. We believe this can also be accomplished in the amateur service. For example control links can share the same frequencies. We note the ARRL's statement that in some cases 16 or more control links share the same channel already. However, this does not appear to be typical. We see no reason that an even greater number of control links could not be carried on the same frequency given that these are very short duration transmissions.[22] If changes in amateur band plans are required to facilitate any necessary reaccommodation, this can be examined in a subsequent proceeding.

27. We recognize that in some areas, particularly Southern California, that more efficient use of the spectrum will be required.[23] The reaccommodation process in this area will probably require retuning some equipment and the loss of some air-time. Further, it may require some amateur repeater operations to time-share channels within the same geographical area. However, we note that sharing of frequencies and tuning equipment is part of the nature of the amateur radio service. With regard to the Condor network, we are cognizant of its importance. Nevertheless, only one of the dozen or so frequencies used by this system is located in the 220-222 MHz band and will have to be relocated. We do not believe therefore, that this system's existence is threatened. Further, we note that in some areas, such as Southern California, it may be necessary to begin moving some operations to higher frequency bands such as the 902-928 MHz amateur band. In any event, as stated in the *Report and Order*, we believe that the vast majority of amateur operations from the 220-222 MHz band can be reaccommodated in the 222-225 MHz band at little or no cost and with little or no loss of air time.

28. A number of amateur interests challenge the Commission's statement in the *Report and Order* that the 2 MHz from 220-222 MHz band represents less than a 2% reduction in amateur spectrum. We believe this statement is fair and correct. In making this statement, the Commission included only amateur bands that are capable of supporting operations similar to those in the 220 MHz region. These bands, 28-29.7 MHz, 50-54 MHz, 144-148 MHz, 220-225 MHz, 420-450 MHz, 902-928 MHz and 1240-1300 MHz, provide 128.7 MHz of spectrum to the amateur service, of which 2 MHz represents less than 2%.[24] We recognize that some of these bands are shared bands; however, all are available and used by the amateur service.

29. Several petitioners argue that the loss of the 220-222 MHz band should more appropriately be viewed in the context of amateur primary allocations. They contend that the two megahertz in the 220-222 MHz band represents

fifteen percent of amateur primary frequency allocations between 30 MHz and 24,000 MHz. This is true with regard to primary spectrum. However, it does not take into account the large amount of spectrum allocated to the amateur service on a secondary basis. In this regard we note that some of the spectrum allocated to the amateur service on a secondary basis is used extensively, particularly the 420-450 MHz band.

30. The petitioners also do not take cognizance of the fact that the 220-225 MHz band was a secondary allocation to the amateur service for 25 years prior to 1983. In 1983, this band was allocated to the fixed, mobile and amateur services on a co-primary basis in the *Second Report and Order* in General Docket No. 80-739, Implementation of the Final Acts of the 1979 World Administrative Conference.[25] It was plainly stated in that proceeding that this band would be the subject of a future rule making proceeding. This band was never intended for exclusive amateur use. Not only was this fact plainly stated in that proceeding, but it is also plainly stated in the amateur service rules. Section 97.7(g)(4) (47CFR 97.7(g)(4)) states "This band is allocated to the amateur, fixed and mobile services in the United States on a co-primary basis. The basic principle which applies is the equality of right to operate so as not to cause harmful interference to each other." Therefore, we reject the assertion that this band was exclusive amateur primary spectrum.

31. *Packet Radio*. Amateurs assert that packet radio is a new technology that requires the use of the 220-222 MHz band, particularly for long-haul intercity trunks. They argue that there is no other band that can accommodate the rapid growth of this technology. The ARRL also maintains that, while the Commission based the land mobile allocation in part on the need to accommodate new land mobile technology, it failed to recognize amateur packet radio as a new technology warranting adequate provisions by the Commission.[26]

32. Provisions for packet radio have been made in a number of amateur bands. The *Report and Order* notes that the majority of amateur packet operations are already located in the 144-148 MHz amateur band. No new information has been submitted indicating otherwise. We also note that the amateur band plan for 420-450 MHz lists nine 100 kHz bandwidth channels for packet radio and six 25 kHz channels. Further, we believe the 902-928 MHz band provides a significant opportunity for the growth of packet radio. Amateur literature indicates this band is little used. The amateur band plan for 902-928 MHz provides two 3 MHz channels for packet radio. While some amateurs argue that propagation characteristics make use of the 902-928 MHz band impractical, we note that fixed services in the 928 MHz and 956 MHz bands transmit data over distances of 30 miles. We also note that some amateurs argue that the 915 MHz band is unsuitable because no commercial equipment is available. We do not find this a compelling argument in that if there is demand for equipment to operate on this band, manufacturers can be expected to produce that equipment. We also observe that one of the purposes of the amateur service is to learn about radio and this process is facilitated through construction of equipment. With regard to packet radio use of this band for future intercity trunks, we note that many of these trunks would go through rural areas, where the use of the spectrum tends to be light. Therefore we do not expect that it will be difficult to find frequencies for amateur packet radio in the 222-225 MHz band. We conclude that the Commission's action will not impede the futuregrowth of packet radio.

33. *Emergency Communications*. The ARRL and other amateur interests claim that, contrary to the Commission's findings in the *Report and Order*, amateurs' ability to provide emergency communications will be severely impaired by loss of the 220-222 MHz band for use by amateur radio.[27] This argument rests primarily on two premises. First, amateurs claim that control frequencies would not be able to be replaced and therefore the associated repeaters would have to be shut down. Second, they contend that packet radio provides new computer-to-computer communication that will be thwarted because the 220-222 MHz segment was going to be used for major high-speed intercity trunks. The NCS petition for reconsideration claims that the *Report and Order* does not reflect adequate consideration for the national security emergency preparedness concerns of the Federal agencies composing the NCS. The thrust of its petition is that emergency communications by amateurs will be impaired and therefore the Commission's allocation runs against national security interests.

34. As discussed above, we reject the claims that it will not be possible to find new control frequencies and that packet radio growth including intercity links will be impeded. In response to the NCS concern that adequate consideration was not given for national security emergency preparedness, we note that the NCS made no showing that amateur spectrum is inadequate. As stated in the *Report and Order*, several hundred channels are available to the amateur service for use in emergencies. The *Repeater Directory* lists 268 channel pairs for repeater operations in the 50-54 MHz, 144-148 MHz, 222-225 MHz and 420-450 MHz bands, and an additional 358 channel pairs for repeater operations in the 902-928 MHz and 1240-1300 MHz bands. This totals more than 600 repeater channel pairs alone, and does not include all the other amateur frequencies not used for repeaters. Further, we note that most emergency communications over long distances are conducted on amateur bands below 30 MHz. We continue to conclude that adequate provisions are available for amateurs to provide communications during emergencies.

35. We also believe that it is important to keep in perspective that the amateur service is a hobby service that volunteers assistance as a public service during emergency situations. Nevertheless, the amateur service may be assured of the Commission's total support to the amateur community's dedication and commitment to public service in times of national and international disaster.

36. *Procedural Issues*. A number of amateur interests, including the ARRL, claim that there were several procedural irregularities in this docket.[28] They argue that these irregularities caused serious damage to the quality, fairness and accuracy of this proceeding. Specifically, they claim that the comment period was short and did not allow the amateur community to adequately argue its concerns. They argue that, in light of the overwhelming opposition by amateurs, the Commission's decision is not supported by the public record.[29]

37. The Commission followed the normal procedure for rule making proceedings as defined in Part 1, Subpart C, "Rule Making Proceedings", of the Commissions rules.[30] Specifically, with regard to the ARRL's claim that there

was not adequate time provided to file comments, we note that the original comment and reply comment dates of April 6, 1987, and April 21, 1987, respectively, were extended by *Order* to May 21, 1987, and June 19, 1987, respectively.[31] The reply comment period was further extended by *Order* until July 31, 1987.[32] This provided almost six months for interested parties to file comments.

38. While it is true that an extremely large number of comments were filed in support of allocating the entire 220-225 MHz band to the amateur service, we reject the argument that the decision of the *Report and Order* is not supported by the record. The Commission must base its decision on the merits of the issues and not the number of comments filed in favor of a particular point of view. In this proceeding the Commission found that the public interest would best be served by providing an allocation to the land mobile service dedicated for the development of narrowband technologies. This was based on the merits of the issues as developed in the record of this proceeding.

39. Amateur interests also argue that the Commission violated its own rules by accepting the late-filed Comments of United Parcel Service (UPS). They claim that prior to the acceptance of these comments, there was no serious support by the land mobile community for the proposal. The ARRL asserts that acceptance of the UPS comments was a desperate attempt by the Commission's staff to show support for the proposal and was indicative that the outcome of the proceeding was predetermined.

40. The late-filed comments of UPS were accepted in order to develop the public record as completely as possible. UPS had provided information on possible use of the proposed land mobile band for data networks. This was new information that could not have been presented within the original comment period. This action is provided for in Section 1.415(d) of the Commission's Rules, 47 CFR 1.415(d). Further, after accepting the UPS comments the Commission opened up a reply comment period to the UPS comments, to which the ARRL also filed reply comments. We also note that the Commission accepted numerous late comments from amateur interests, that were submitted through congressional offices.

41. The Commission has developed a full record in this proceeding. All of the issues raised by the comments were fully addressed by the Commission in the *Report and Order*. The Commission was well aware of the issues and the record in this proceeding when it concluded that an allocation of spectrum to the land mobile service for narrowband operations is warranted. We find no basis for the ARRL's allegations of biased or unfair treatment.

42. The Commission received a "Request For Oral Argument" from the ARRL in this proceeding on January 5, 1989. The ARRL argues that the issue of the needs of the amateur service for continued access to the 220-222 MHz band warrants such an opportunity for presentations. Amateurs also noted a Congressional resolution which states that "It is the sense of the Congress that- (1) it strongly encourages and supports the Amateur Radio Service and its emergency communications efforts: and (2) Government agencies shall take into account the valuable contributions made by amateur radio operators when considering actions affecting the Amateur Radio Service."[33] Amateurs contend that this resolution makes it incumbent upon the Commission to take additional measures beyond the normal administrative procedures such as holding oral arguments.

43. In response the Commission received an "Opposition to Request For Oral Argument" from UPS. UPS states there is no legal reason for the Commission to grant an oral argument, there is no factual basis for an oral argument as there is a full written record in this proceeding and that granting an oral argument would only delay the use of the 220-222 MHz band for the development of narrowband technologies.

44. It is not the Commission's policy to routinely grant oral arguments in rule making proceedings, particularly in proceedings that have a full written record as in the case of this proceeding. Further, we note that oral *ex parte* presentations may be made to the Commissioners during the course of a rule making proceeding. In this proceeding a number of such oral *ex parte* presentations were made to each of the Commissioners including several presentations by the ARRL. With regard to the sense of Congress, we feel that our re-evaluation of the issues and the Commission's decision and further consideration of the options presented by the amateur community adequately responds to both the letter and intent of the Congressional mandate. We do not believe that holding oral arguments would further our response to the sense of Congress as nothing before the Commission suggests that oral arguments would bring forth new information that has not already been considered. Therefore, we are denying the ARRL's "Request for Oral Argument".

45. *TV Answer Petition*. In its Petition for Rule Making, RM-6196, TVA requests a fixed allocation of one-half megahertz in the 216-222 MHz band centered at either 216.25 MHz, 218.25 MHz or 220.25 MHz for a television viewer-response service.[34] In its Petition for Reconsideration in this proceeding TVA requests the Commission to reconsider its decision to the extent that the allocation precludes the grant of TVA's Petition for Rule Making. It argues that the Commission's decision in this proceeding will affect, and may in fact preclude, the Commission's deliberation in RM-6196 with regard to an allocation between 220 and 222 MHz. The Petition for Reconsideration is supported by the Association of Maximum Service Telecasters (MST) and is opposed by ARRL, AAR, FIT, LMCC and UPS.

46. In its petition TVA argues that the Commission could maximize the public benefit of the 220-222 MHz band if it were to reallocate 0.5 MHz for viewer-response systems. TVA claims there is an unmet need for a low cost television viewer-response systems that do not rely on either the telephone system or two-way cable. It argues that viewer-response systems would encourage efficient use of the spectrum as such systems will allow millions of viewers to interact with their televisions. It claims taking 0.5 MHz from the land mobile allocation would still leave 1.5 MHz for that service and that this reduction would not diminish or compromise the Commission's policy objectives. It argues this is an equitable balancing point that maximizes efficient use of the spectrum.

47. MST supports an allocation for a viewer-response service. However, MST is concerned about potential interference to TV channel 13 operations. MST notes that the 220.25 MHz alternative for a viewer-response service is the farthest from channel 13 and therefore, is the least likely to cause interference to channel 13 operations. It argues that the Commission should reassess its allocation and should provide for this service above 220 MHz. However, MST also argues that any allocation of spectrum in

the 220-222 MHz band for a viewer-response service should be made secondary to TV broadcast operations on channels 10-13.

48. AAR, FIT, LMCC and UPS argue that the entire 220-222 MHz band is needed by the land mobile service. They note that the allocation is already shared between government and nongovernment users and therefore, allocating 0.5 MHz for a viewer-response service would greatly reduce the spectrum that would be available to the private land mobile radio service. They argue this would have a significant negative effect for the development of narrowband technologies as it would decrease the potential market and reduce the economies of scale necessary to attract investment in narrowband technology.

49. We believe that an allocation of 0.5 MHz to the fixed service in the 220-222 MHz band would undermine the intent of the allocation to the land mobile service. As stated above, this allocation was made to provide spectrum to foster the development of narrowband technologies. We believe an allocation of 0.5 MHz to the fixed service would impede and even discourage manufacturers from making significant investments in the technical development of narrowband technologies. Accordingly, we are denying TVA's petition with regard to an allocation of 0.5 MHz for the fixed service in the 220-222 MHz band. An allocation below 220 MHz will be considered in a separate proceeding.

CONCLUSION

50. We are unpersuaded by the petitions for reconsiderations to make any change to the decision of the *Report and Order*. We believe that all of the relevant issues were adequately addressed in the *Report and Order*.

51. Accordingly, IT IS ORDERED that the petitions for reconsideration filed in this proceeding ARE DENIED.

52. IT IS FURTHER ORDERED that the American Radio Relay League's "Request for Oral Argument" IS DENIED.

53. IT IS FURTHER ORDERED that TV Answer's Petition for Rule Making, RM-6196, is DENIED with regard to an allocation of 0.5 MHz in the 220-222 MHz band.

54. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Report and Order* in General Docket No. 87-14, 3 FCC Rcd 5287 (1988).

[2] *See Second Report and Order* in General Docket 80-739, Implementation of the Final Acts of the 1979 World Administrative Radio Conference, Geneva, 1979, at 31, 49 FR 2357.

[3] *See:* (1) Petition for Rule Making filed by Land Mobile Communications Council, RM-4829 (June 1984), requesting amendment of Parts 2, 22, and 90 of the rules and regulations to make available additional frequency assignments in the land mobile radio service; (2) Petition for Rule Making, filed by Sideband Technology, Inc., RM-4831 (July 1984), requesting reallocation of 6 MHz at 216-222 MHz to the private land mobile radio services for narrowband systems using 5 kHz channeling; and (3) Petition for Rule Making filed by LAOAD Radio and Microwave Communications Consultants, RM-4083 (March 1985), requesting a reallocation of 4 MHz at 216-220 MHz to the private land mobile radio services for narrowband voice and low speed data communications systems.

[4] *See Notice of Proposed Rule Making* in General Docket No. 87-14, 2 FCC Rcd 796 (1987).

[5] *See* Section 97.7 of the Commission's Rules, 47 CFR Section 97.7, for a listing of the amateur frequency bands.

[6] About 40 petitions came from amateurs in Nevada and Arizona who communicate on amateur networks linked to California. Between 20 and 30 petitions were filed by amateurs in Florida and Missouri. No other state had more than a dozen amateur petitions. No petitions were filed by amateurs in 26 states. Due to the large number of petitions, we have not cited each one in this *Memorandum Opinion and Order*. However, all the petitions have been considered and the issues raised by the petitions are all addressed.

[7] TV Answer's petition, RM-6196, was filed with the Commission on December 2, 1987, after the Commission had adopted the *Notice of Proposed Rule Making* in this proceeding. In the *Report and Order* the Commission stated that the TVA petition would be considered on its own merits and addressed in a separate proceeding. *See Report and Order* in General Docket No. 87-14, *supra*, at footnote 7.

[8] *See Report and Order* in General Docket No. 87-14, *supra*, at 13-19.

[9] The Commission is addressing expanding the permissible use of trunking technologies in Private Radio Docket No. 87-213, *See Notice of Proposed Rule Making* in PR Docket No. 87-213, 4 FCC Rcd 312 (1989). Further, in the *Report and Order* in General Docket No. 87-390, 3 FCC Rcd 7033 (1988), the Commission is permitting the liberalization of technology including the use of digital technology in the cellular radio service.

[10] As ARRL indicated earlier in this proceeding, the 220-225 MHz band had been the target of numerous requests for allocations for other services since the mid 1970's.

[11] Several amateurs argued that technical problems with operation in the 30-50 MHz band could be overcome. For instance they state that problems with skip propagation could be ameliorated through use of tone coded squelch. While tone coded squelch may help to reduce the annoyance of distant transmissions, this would not solve interference problems.

[12] *Id.* at 20-24.

[13] An examination of the Commission's license data base for the 30-50 MHz band reveals there are no unused frequencies. There is a wide spread in the number of assignments per channel, but typically, each channel has about 100 or more assignments. Some channels have more than 500 assignments.

[14] The Commission made an in-depth study of interference to TV channel 13 operations when it allocated the 216-220 MHz band for the maritime mobile service. *See* R. Eckert, *Guidance for Evaluating the Potential for Interference to TV from Stations of the Inland Waterways Communications Systems*. FCC/OST TM 82-5 (July 1982). The analysis is applicable to the land mobile service because the radio equipment characteristics are similar. The Commission concluded from this analysis that the maritime mobile service could avoid interference to TV channel 13 operations through careful system design. This is made possible because operation is inherently limited to waterways. Still, the

Commission restricted maritime mobile service within 105 miles of TV channel 13 operations. In contrast, land mobile operations are not limited geographically and a similar mileage restriction would rule out land mobile operations in many urban areas.

[15] *See,* for example, Petitions for Reconsideration filed by Richard W. Binske and Jim Watson, respectively.

[16] *See,* for example, Petition for Reconsideration from Edwin James Kroeker.

[17] We recognize that in parts of New York City and Los Angeles areas, the number of repeaters at 220 MHz and 144 MHz is similar. However, when considering the overall metropolitan areas, the number of repeaters at 144 MHz is still at least twice that at 220 MHz.

[18] *See* Petitions for Reconsideration from the Oregon Region Relay Council, Inc. and the Portland Amateur Radio Club, Inc., respectively.

[19] *See,* for example, Petitions for Reconsideration filed by Gregory Maynard and Richard G. Brown, respectively.

[20] *See,* for example, Petition for Reconsideration filed by Bill L. Barrett.

[21] *See,* for example, Petition for Reconsideration filed by Dennis M. Coker and Richard F. Slepicka, respectively.

[22] We also note that the Commission's recent proceeding in PR Docket No. 88-139 provides for control of repeaters on the operating frequencies of the repeater. *See, Reort and Order* PR Docket No. 88-139, 4 FCC rcd 4719 (1989) at 51. As noted in the *Report and Order* of this proceeding (paragraph 35), amateurs may wish to file a petition to allow for control channels below 222 MHz.

[23] In its Petition for Reconsideration, the ARRL suggests that the Commission might have considered a secondary allocation in the 216-220 MHz band as replacement spectrum for displaced amateur users at 220-222 MHz. No such allocation was proposed or raised by the commenters in this proceeding. ARRL may, if it so chooses, submit a petition making a specific proposal. The petition would need to provide support for why an allocation is needed and show how amateur operations could use this band without causing interference to existing users of this spectrum or to adjacent TV channel 13 operations in the 210-216 MHz band.

[24] These are the bands listed as available for repeater operations in the ARRL *Repeater Directory.*

[25] *See Second Report and Order* in General Docket No. 80-379, *supra,* at footnote 2.

[26] *See,* for example, Petitions for Reconsideration filed by Edward Andrews Keough and Garry William Palmer.

[27] *See,* for example, Petitions for Reconsideration, filed by Joseph J. Rotond and William Chandler, respectively.

[28] *See,* for example, Petition for Reconsideration filed by Glenn Thomas.

[29] *See,* for example, Petition for Reconsideration filed by William Gordon Cronkhite.

[30] *See* 47 CFR 1.399-1.430.

[31] *See Order Extending Time for Comments,* General Docket 87-14, DA 87-364, 52 FR 13481, April 23, 1987.

[32] *See Order Extending Time for Reply Comments,* General Docket 87-14, DA 87-798, 52 FR 25613, July 8, 1987.

[33] *See* "Federal Communications Commission Authorization Act of 1988," Congressional Record-Senate, S15293, October 7, 1988.

[34] *Supra,* footnote 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-120

In the Matter of

Flexible allocation of
frequencies in the Domestic
Public Land Mobile Service
for paging and other services

SECOND REPORT AND ORDER

Adopted: July 13, 1989; Released: August 18, 1989

By the Commission:

1. On May 14, 1987, we issued a Notice of Proposed Rule Making (NPRM) requesting comments on proposed changes to our Rules regarding certain paging and two-way mobile frequency allocations.[1] The proposed changes would affect Section 22.501(b), the conventional mobile two-way channels; Section 22.501(k), the UHF-TV band common carrier channels available for two-way use in 13 large metropolitan areas; and Section 22.501(p), regarding the remaining nationwide paging frequency. In this Order we address issues pertaining to Section 22.501(k) of our Rules. The previously-issued *First Report and Order* addressed the issues pertaining to Sections 22.501(b) and 22.501(p).[2]

BACKGROUND

2. Section 22.501(l) of our Rules was proposed in Docket No. 18261 by a July 17, 1968 Notice of Proposed Rule Making. [3] The resulting *First Report and Order*, 23 F.C.C.2d 325 (1970), allocated two of the lower seven UHF-TV channels for common carrier use within 50 miles of the center of the 10 (now 13) largest Metropolitan Service Areas (MSAs). Assignment principles and specific frequencies were established by the *Second Report and Order*, 30 F.C.C.2d 221 (1971). That Order also made the determination that there should be an "open entry" policy for the frequencies. Petitions for Reconsideration on the open entry decision were filed by the National Association of Radiotelephone Systems (NARS), the predecessor-in-interest of Telocator Network of America (Telocator), and by a group of radio common carriers. By *Memorandum Opinion and Order* we granted a stay, postponing the effective date of frequency allocation pending action on the reconsideration petitions. By our *Fifth Report and Order*, 48 F.C.C.2d 360 (1974), three additional MSAs were added to the original ten and provisions were made for common carrier operations. Docket No. 18261 was then terminated except for the disposition of reconsideration petitions.

3. By *Memorandum Opinion and Order and Notice of Proposed Rule Making*, 63 F.C.C.2d 126 (1977), the reconsideration petitions were denied. We reaffirmed our policy of permitting open entry and proposed to make the frequencies available on a shared basis. Comments were solicited on this proposal. By *Memorandum Opinion and Order* in Docket No. 21039, 44 Rad. Reg. 2d (P&F) 813 (1978), we affirmed our proposal for shared use and established that participants filing applications within 60 days of the public notice would work together to determine the necessary technical arrangements for their systems. Applicants filing after the 60 days would have to comply with the technical requirements thus developed. With some modifications, this proposal was affirmed by *Memorandum Opinion and Order*, 47 Rad. Reg. 2d (P&F) 539 (1980).

4. Operations were eventually begun in many of the thirteen MSAs.[4] Traffic loading studies filed pursuant to our Rules, as well as comments received in the instant proceeding, show that subscribership began strongly and increased initially. However, as with subscribership on conventional mobile frequencies, UHF band use began a dramatic decrease with the availability of cellular radiotelephone in late 1983 and 1984. Most UHF operators had scarcely two years of operation before their subscribership began to decrease.

5. In the *Notice of Proposed Rule Making* in the instant proceeding, we postulated that the shared licensing arrangement may be discouraging use of the UHF frequencies. Therefore, one of the proposals we made was to modify the eligibility criteria for the UHF band so that new licenses would be issued only to applicants that had received the explicit approval of the existing licensees. In addition, existing licensees would be permitted to change the sharing arrangement by entering into formal joint ventures, mergers, or straight buyouts. We also proposed to expand the types of communications permitted on these channels in the same manner as proposed for the Section 22.501(b) frequencies.[5] We further proposed to consider formally reallocating some of the channels to other purposes.[6] Under this option, UHF licensees would retain only the number of frequencies needed to permit .25 or less blocking probability under loading conditions specified in the licensees' traffic loading reports. (Quarterly traffic loading reports must be filed by each licensee using the UHF-TV frequencies.) Applying the .25 blocking probability standard to information contained in the December 1986 quarterly traffic loading reports, paired frequencies available for other purposes range from 6 to 24 among the thirteen urban areas. Finally, we did not propose to change technical parameters designed to protect television operations.

PARTIES' COMMENTS

Issues Specified in the NPRM

6. Commenting parties are almost unanimous in stating that some changes must be made to ensure more efficient use of the public land mobile frequencies in the UHF-TV band.[7] However, there is much disagreement on what those changes should be. Telocator proposes that the Commission split six pairs of frequencies within the allocation for each MSA and make them available for control facilities. Telocator's extensive and detailed proposal for the technical parameters of these control facilities, prepared by Dr. George Schrenk of Comp-Comm, was supplemented by written and oral *ex parte* presentations to the Commission's staff, included in the record in this

proceeding, to provide a simplified calculation for the service and interference parameters discussed in Telocator's comments and reply comments. Telocator proposes that applications for these control channels be accepted only if four or more base stations would be served. In support of using some of the UHF allocation for control channels, Telocator states that control frequencies are essential for wide-area paging systems because radio is the only practical means for controlling transmitters in a simulcasting system.

7. After the six-channel allocation is made, Telocator proposes that the Commission grant exclusivity on the remaining frequency pairs to existing licensees and permit these channels to be used for any two-way service as an incentive for the development of new technologies such as talk-back paging, data, and portable telephone services.

8. Other commenters include RCCs who argue that they are grandfathered for dispatch service pursuant to Section 331(c)(2) (47 USC 332) of the Communications Act, as amended, and that we should permit dispatch service on the UHF band.[8] RCC commenters, including some existing UHF licensees, also propose that expanded use of the UHF band should include both one-way and two-way services. Motorola additionally suggests that we include a "sunset" provision such that existing two-way channels would revert to other uses as existing common carrier two-way use declines.

9. Requesting reallocation of the UHF common carrier band to private radio services are the American Petroleum Institute, the American SMR Network Association, and Motorola. These parties argue that Specialized Mobile Radio (SMR) frequencies are in short supply in major metropolitan areas. Parties suggesting that the UHF frequencies should be reallocated to Public Safety purposes include the International Municipal Signal Association and the International Association of Fire Chiefs, Inc., (filing jointly). In the Los Angeles area, five municipalities have requested a number of the UHF-TV common carrier frequencies for public safety use. On April 4, 1989, these municipalities and a consortium of radio common carriers in the area filed a joint request regarding the reallocation of these frequencies.[9] This request is treated in more detail in the Discussion Section.

DISCUSSION

Issues Raised in the NPRM

10. Four general issues were raised in our NPRM. These issues are: a) legal authority to reallocate some or all of the UHF common carrier band frequencies; b) the best use to be made of UHF-TV band frequencies not needed for existing two-way mobile traffic; c) the circumstances under which two-way common carrier use of the UHF-TV band should continue; and d) application procedures for the reallocated channels.

11. *Legal authority for reallocation.* The UHF-TV band licensees are each licensed for all the available channels on a shared basis. The current licensees' authorizations expire April 1, 1989, and have not yet been renewed. It is well established that this Commission may decline to grant a license renewal, without conducting a hearing, if we have found, as a result of a Rule Making proceeding, that the frequencies in question should be reallocated. *Transcontinent Television Corporation,* 308 F.2d 339 (D.C.Cir. 1962). Thus, we have the legal authority to reallocate some or all of the UHF-TV band public land mobile channels if the public interest so requires.

12. *Use of UHF-TV frequencies not needed for existing two-way service.* Because there is little chance that demand for conventional two-way mobile telephone use will increase on the UHF-TV band channels, and that the most acute frequency needs are in the 13 MSAs with UHF allocations for mobile use, we are, with the exception discussed below (*see* paragraphs 26 - 38), going to authorize UHF-TV band frequencies, other than those needed to meet existing two-way service, for common carrier control use. We have considered all the comments made in response to our NPRM.

13. Wide-area paging systems do not operate properly without radio control frequencies. We agree with Telocator's statement that:

> Control frequencies are essential for modern paging systems. Most systems utilize several sites in order to provide both comprehensive and geographically wide spread service. Today, most wide area systems simulcast pages. Simulcasting depends not only upon very stable phase correlated transmitters, but also on highly reliable circuits to relay traffic to those transmitters. Because the path lengths of wireline circuits are subject to alteration without prior notice, radio serves as the only practical means for controlling transmitters in a simulcasting system. (Telocator Comments, pages 12-13.)

14. With the one exception discussed below for Los Angeles, the commenters have not persuaded us that other uses for the UHF-TV band are more pressing than the need for common carrier control channels. In particular, the comments do not indicate that declining two-way use of the UHF frequencies may be the result of insufficient incentives to the licensees, as we tentatively postulated in the NPRM. None of the commenters indicated that exclusive use of the channels would improve incentives to offer two-way conventional telephone service. Judging from the fact that alternative services were stressed by commenters, the problem appears to lie in the lack of subscriber demand for conventional two-way telephone service.[10] There are four categories of use which the comments identify as having insufficient spectrum: control, private mobile radio, paging and development of new one-way or two-way technologies.

15. With the one exception discussed below for Los Angeles, we decline to allow private radio users access to the channels we are removing from conventional two-way common carrier service. We are cognizant of the desire of private land mobile services for additional spectrum. However, we do not find on the basis of this record a compelling argument to allot the particular frequencies at issue here for private land mobile service in lieu of common carrier services. Common carriers have submitted specific information showing that frequencies required for control of their systems are unavailable in major urban areas. Moreover, Telocator points out that private radio users have acquired most of the control channels designated for sharing with common carriers, while control channels reserved for private radio users remain available. Control frequencies are critical for common

carrier operations. Accordingly, we believe the public interest is best served by retaining the subject frequencies for common carrier use for control purposes.[11]

16. Commenters also ask us to consider allowing paging on the UHF-TV band frequencies. The Commission has taken several actions to provide adequate frequencies for paging services. In the *First Report and Order*, we authorized any one-or two-way service on conventional mobile channels. In 1982 we allocated 931-932 MHz for common carrier paging and allocated 930-931 MHz for future advanced technology paging systems. *First Report and Order*, General Docket No. 80-183, 89 F.C.C.2d 1337 (1982). These frequencies remain available. Recently we allowed paging services to be provided on an auxiliary basis over cellular frequencies, *Report and Order*, General Docket No. 87-390, 3 FCC Rcd. 733, 53 Fed. Reg. 52174 (December 27, 1988). We believe that there are sufficient channels for paging to meet present market demand. Moreover, expanded opportunities for paging systems on conventional frequencies and on the 900 MHz frequencies make the need for control channels to operate these systems even more acute. The parties in this proceeding represented that all existing control frequencies are occupied in major metropolitan areas. We receive many requests for control channels from urban common carriers and we are no longer able to find such channels available for them. Having expanded wide-area paging opportunities, we find it necessary to allocate more frequencies for control purposes so that wide area systems can operate properly. It serves little purpose to allocate more channels for paging which will not have radio control channels available for proper system operation.

17. With regard to some commenters' request that we make the unneeded public land mobile frequencies available for development of new two-way or one-way services, we have recently adopted a *Report and Order* in General Docket No. 87-390 in which we authorized that auxiliary services could be provided on cellular frequencies, which includes provisions for new technological innovations. In addition, our *First Report and Order* in this proceeding authorizes technological innovation on conventional mobile frequencies. Thus, we believe that there is ample spectrum for development of new common carrier mobile services at this time.

18. A number of parties remarked that common carrier UHF licensees should be allowed to recoup their investments in these systems through the opportunity to offer services other than conventional two-way mobile telephone. The parties have failed to set forth any specific figures to persuade us that such investments have not already been recouped. Moreover, although it is clear that conventional two-way use is waning, it is also clear that some subscribers are satisfied with the service and intend to stay on. More importantly, our primary concern in this matter is the public's need for service, not the commercial interests of service providers except to the extent that this affects service to the public.[12]

19. Four of the 13 MSAs have special circumstances. Los Angeles area common carriers will receive six control channels (6 split channels derived from three of the existing frequency pairs), four paired channels will be reserved for existing two-way mobile service and the remaining seventeen paired channels of the twenty-four channels available in Los Angeles will be reallocated for public safety purposes. As will be seen in the rules amendment, Appendix 2, Houston alone among the urban areas is making considerable use of the UHF two-way channels for mobile service. As a result, Houston area common carriers will have only two additional control channels. Finally, as Telocator notes, Cleveland and Detroit were never able to commence UHF-TV common carrier operations due to potential interference problems with Canadian stations. Footnotes 1 and 2 to Table A, Rule Section 22.501(l)(5)(i), currently state that Channels 14 and 15 are not available in Cleveland, and that Channels 15 and 16 are not available in Detroit, "until further order from the Commission." Acceptance of applications for these channels was suspended because of potential interference problems with Canadian companies. Because the problem which gave rise to this restriction has been corrected, we herein order that Channels 14 and 15 in Cleveland, and Channels 15 and 16 in Detroit, are open for control use applications consistently with the rules promulgated in this Order.

20. It is our observation that the acute shortage of control channels has been clearly demonstrated by the inability of the staff to satisfy the large number of requests for such channels. Moreover, we note that public demand for paging is growing apace. In our view, the greatly increased number and scope of paging systems, *see* paragraph 16, *supra*, requires an increase in control channels.

21. Accordingly, we have decided to make most of the UHF-TV channels not needed for two-way service available for control purposes. However, it is not our desire to allow the frequencies to lie fallow should they not be needed (or usable) for common carrier control purposes. Accordingly, five years from the date these frequencies will be available for common carrier control use, the Commission will review this matter. If there are unused channels the Commission will consider whether to initiate a new proceeding to determine how best to use these frequencies including possible reallocation to other services.

22. *Use of channels for existing two-way service.* We retain for two-way common carrier service the number of channels necessary to give a grade of service of. 25 or less on each two-way system still in operation as of the time renewal applications are to be filed for these frequencies.[13] We will grant exclusivity to existing licensees (*i.e.* no new licensees will be authorized to operate on the two-way frequencies except successors-in-interest to existing licensees). We find that this approach will benefit the public using these frequencies by encouraging the licensees to continue to offer this service as long as there is demand for the service. Of course, new subscribers may be accepted on the system. Conventional two-way use of these frequencies has been steadily declining, primarily because of the availability of cellular radio service. Most likely over time subscribers will switch to cellular. Therefore, based on this finding we see no reason to allow anyone except current licensees to provide service on the two-way frequencies. Moreover, all frequencies not needed for two-way use will be reassigned.[14] In addition, we will accept Motorola's suggestion that the new licenses for two-way use should contain a "sunset" provision, with some modification. We will review the traffic loading level on each system annually and if the number of frequencies needed to maintain a .25 blocking probability or less has decreased, any excess frequency or frequencies will be reallocated to control use.[15]

23. *Application for new control channels.* The frequencies not needed for two-way communications are available for control frequency applications because the renewal date of April 1, 1989 has passed.[16] Applications for the new control channels will be subject to the standard procedures set out in Part 22 of our Rules. As Telocator proposed, we will make this rule consistent with our current rules granting control channels to provide that no application will be accepted which does not propose at least four points for control by each frequency requested.

24. Control base stations on both "base" and "mobile" UHF-TV band frequencies are subject to existing technical requirements (*e.g.* effective radiated power (ERP), height above average terrain (HAAT), etc.) for base stations operating two-way communications systems.[17] Section 22.501(l) of the Commission's Rules. In addition, protection to television broadcasting shall be maintained in accordance with existing Rule Section 22.501(l).

25. We direct the staff to issue a public notice announcing the availability of the specified UHF-TV frequencies for control service after this order becomes effective. Applications proposing services which are electrically mutually exclusive will be subject to our random selection procedures in accordance with Sections 22.33 and 1.823 of our Rules.

Los Angeles Public Safety Allocation

26. Five California cities, Burbank, Compton, Glendale, Torrance, and Whittier (hereinafter Petitioners or the "municipalities") petitioned the Commission for reallocation of nineteen of the twenty-four Los Angeles UHF common carrier frequencies to public safety purposes.[18] The municipalities also requested a waiver of the rules to permit base and mobile operations within the same channel. (Currently, base and mobile operation is split between two channels.) All five municipalities are within the fifty mile radius defined by Section 22.501(k) as being the geographical limit for land mobile use of the UHF-TV channels.

27. Petitioners provide police, fire, emergency medical, local government, public utility and public works services to over 500,000 persons. The municipalities each have their own public safety organizations but rely to varying degrees on the Los Angeles Sheriff's Department. The municipalities want to be able to communicate on an intra-city level among their public safety arms, and they also want to communicate with the Los Angeles Sheriff on their existing UHF equipment. Petitioners support their request with descriptions of the demographic, geographic, and political situations in the Los Angeles Basin which necessitate communications among the various jurisdictions for purposes of mutual aid. In addition, they state the proposed uses for the requested frequencies.

28. In 1985, the Commission allocated UHF-TV channel 16 (482-488 MHz) for public safety use in the Los Angeles area, which created 120 two-way mobile channels of which 55 were earmarked for the Sheriff. Petitioners state they are cooperating with other Los Angeles area public safety agencies to plan the use of the remaining 65 frequency pairs but that "in the planning process, it has become apparent that . . . additional frequency pairs in the same band are needed by Petitioners to effectuate their part of the planned county-wide use of these new [channel 16] public safety frequencies." Petitioners state that the Channel 16 allocation "has become the backbone to the development of an effective area-wide, coordinated Los Angeles area public safety frequency utilization plan. In order for Petitioners and other Los Angeles area jurisdictions to fully utilize this 482 MHz allocation efficiently in the manner envisioned by the Commission, immediate authorization to use the practically dormant RCC frequencies requested herein is essential."

29. None of the frequency pairs available from the Channel 16 allocation has been designated for petitioners, with the exception of Glendale. Glendale apparently will receive 10 channels from the existing Channel 16 allocation, but it wants another four from the common carrier channels at issue herein for the same public safety purposes as the other Petitioners.

30. Petitioners indicate that the plan incorporates techniques for spectrum efficiency, such as frequency reuse, sharing arrangements, use of one offset channel for shopping mall police, use of downtilt and/or directional antenna systems, and operation on minimum effective radiated power. The plan also contemplates that some UHF band frequencies will be "given up" by public safety agencies as they change over to other frequency bands, including the 800 MHz band. These relinquished frequencies would be recommended for use by other agencies by the Southern California Regional Planning Committee.[19]

31. Opposing the municipalities' request are Telocator and Common Carrier Communications, Inc. (CCC). CCC is a consortium of RCCs that are individually and collectively licensed to jointly operate on the UHF band in Los Angeles. CCC argues that channels not needed for two-way common carrier use should be available for control channels for wide-area paging systems. According to CCC, all or most available radio control channels in the Los Angeles area are already licensed, leaving the carriers dependent upon expensive and unreliable wireline circuits for controlling their base stations. Common carriers offer services to numerous hospitals, ambulance services, police and fire departments, and other government agencies in the County, as well as a nuclear power plant.

32. CCC further argues that the Commission has already allocated 480 channels in the 800 MHz band for public safety operations and that spectrum will become available in other bands, including UHF, as public safety licensees 'migrate' to 800 MHz. CCC argues that Petitioners seek to acquire common carrier frequencies for their long-term needs without considering the planning process which the Commission has already set in motion for public safety. They state that Petitioners' actions also run counter to the Commission's admonition to the Los Angeles public safety community that they must satisfy future needs with more efficient use of their present allocation, rather than continually asking for new channels. CCC also argues that Petitioners' proposed use of common carrier channels for public works and other undetermined operations are not of such a pressing emergency nature involving the safety of life that they cannot be satisfied in the 800 MHz band.

33. CCC also argues that Petitioners will use the five interoperability channels in the 800 MHz band set aside by General Docket No. 87-112, which are reserved for coordination of local, regional, and national responses to disasters and emergencies. It states that these channels will lessen the need for use of the 470 - 512 MHz frequencies now allotted to common carriers.

34. Telocator argues that Petitioners have failed to establish that they have a pressing need for the requested frequencies which would justify the proposed reallocation. It argues that Petitioners virtually ignore the fact that the Commission recently has allocated considerable amounts of new public safety spectrum in the Los Angeles area. Moreover, Telocator says, Petitioners do not even demonstrate that they will use all of the requested frequencies for public safety purposes.

35. On April 4, 1989, the municipalities and the present RCC licensees in Los Angeles (Common Carrier Communications, Inc., hereinafter "CCC") filed a "Joint Request" regarding the division of the UHF-TV common carrier band in the Los Angeles area. The Joint Request proposed that the municipalities be granted seventeen frequency pairs (rather than the nineteen originally requested) for public safety communications. The remaining seven frequency pairs available in Los Angeles would, under this proposal, be retained by CCC and its constituent entities for the flexible uses identified in the *First Report and Order*, *supra*. CCC would discontinue its two-way service and move its customers to cellular service or other suitable two-way service.

36. We decline to accept the proposal made in the Joint Request. It is not our policy to permit the Los Angeles RCC consortium to displace its customers and keep the seven frequency pairs not needed by the municipalities exclusively for the consortium members' own uses. As common carriers, the RCC consortium members are required to provide two-way service to all customers who request it. We have provided herein that two-way use of the UHF-TV band may continue in the major metropolitan areas which have active systems for the benefit of customers who prefer this service to cellular telephone or private radio. Moreover, the frequencies available for control use are needed by all mobile common carrier service providers, not only those who comprise the Los Angeles area RCC consortium.

37. Nevertheless, the Commission recognized the unique need for additional public safety communications capacity in the Los Angeles area when it allocated UHF-TV channel 16 for public safety land mobile service in 1985. This allocation was predicated in part on the need to facilitate mutual aid between the various public safety agencies operating on frequencies in the 450-512 MHz band in the Los Angeles region. On a broader scale, the Commission in 1986 allocated frequencies in the 800 MHz region to the private land mobile service for development of a public safety National Plan. The National Plan includes provisions for mutual aid frequencies. Nevertheless, the Los Angeles region is unique in this country in that it has been planning for some time to heavily implement mutual aid provisions with equipment operating in the 450-512 MHz band, in keeping with the intent of the Commission's channel 16 allocation.[20] Because this equipment cannot operate in the 800 MHz band, effective mutual aid would be hindered if the Los Angeles area public safety institutions involved here could not obtain frequencies in the 450 - 512 MHz band. We take note of the efforts that have been made to use the 450-512 MHz frequencies efficiently and are satisfied that alternative frequencies in this part of the spectrum in Los Angeles are not available. Therefore, the municipalities' request for seventeen channels contained in the Joint Request has been accorded considerable weight.[21]

38. Nevertheless, there are competing interests for this valuable spectrum. We have discussed elsewhere in this Order the acute need for control channels in major cities, of which Los Angeles is one. Common carrier mobile radio systems must have radio control channels to operate properly. Common carrier systems serve the public interest by facilitating communications for businesses responsible for services and products required by the public; they create employment and make it possible for businesses to realize economies leading to growth and greater employment opportunities; and they serve public and private emergency needs.

39. In the Joint Request, Petitioners admitted that their needs could be met with seventeen rather than nineteen two-way channels. Since the municipalities' needs can be met with this number of channels, we will grant this number of two-way channels to the municipalities and divide the remaining spectrum as follows. We have identified 20 pairs of frequencies that are not required for conventional public land mobile service in Los Angeles, based on our 0.25 loading criteria discussed earlier. (Four of these channels are required to maintain existing two-way service.) We are allotting 3 pairs of frequencies for control channels, thus providing six frequencies for control. We are allotting the remaining 17 pairs of frequencies for public safety use by the municipalities. While this is less than the 19 pairs of frequencies the municipalities requested, we believe it should be sufficient to allow each of the municipalities to satisfy mutual aid requirements in the 450-512 MHz band. Moreover, some jurisdictions are giving up UHF band frequencies in connection with implementation of the Southern California Regional Public Safety Plan. Therefore, additional frequencies may be made available to the petitioners.

40. We also are granting the municipalities' waiver request to discontinue the split channel structure and permit them to operate base and corresponding mobile stations within the same TV channel. Grant of this request will not affect common carrier operations on other UHF-TV channels and will permit effective use of their channels by the public safety entities. This frequency reallocation and waiver will permit the Los Angeles municipalities to operate police and emergency public safety communications within the same region of the spectrum as that of the Los Angeles Sheriff Department, thus increasing mutual aid and facilitating inter-jurisdictional communications. Accordingly, we find that reallocating seventeen common carrier channels to Public Safety use is in the public interest.

41. The following table shows how the Los Angeles area UHF frequencies will be allocated. The pound (#) sign is placed beside frequencies that will remain dedicated to two-way common carrier use. The asterisk (*) is placed beside frequencies that will be re-allocated to Los Angeles public safety entities. In addition, a letter in parentheses indicates how these frequencies will be paired by the public safety users. Frequencies with no symbol are those that will be available for common carrier control purposes under the same rules promulgated for other MSAs herein.[22]

TABLE

Channel 20	Channel 14
506.0125#	470.0125#
506.0375#	470.0375#
506.0625	470.0625* (a)
506.0875	470.0875* (b)
506.1125	470.1125* (c)
506.1375* (k)	470.1375* (d)
506.1625* (l)	470.1625* (e)
506.1875* (m)	470.1875* (f)
506.2125* (n)	470.2125* (g)
506.2375* (o)	470.2375* (h)
506.2625* (p)	470.2625* (i)
506.2875* (q)	470.2875* (j)
509.0125#	473.0125#
509.0375#	473.0375#
509.0625	473.0625* (a)
509.0875	473.0875* (b)
509.1125	473.1125* (c)
509.1375* (k)	473.1375* (d)
509.1625* (l)	473.1625* (e)
509.1875* (m)	473.1875* (f)
509.2125* (n)	473.2125* (g)
509.2375* (o)	473.2375* (h)
509.2625* (p)	473.2625* (i)
509.2875* (q)	473.2875* (j)

CONCLUSION

42. In the *First Report and Order* in this proceeding, we made conventional UHF and VHF common carrier mobile frequencies available for any one-way or two-way technology. In this proceeding, we have made additional multipoint control channels available to large urban areas which are necessary to service wide-area systems created as a result of flexible use of conventional UHF and VHF channels. In addition, we have made some additional UHF channels available to public safety entities in Los Angeles. Existing two-way use of UHF-TV bands will not be disturbed, but as such use declines, unnecessary frequencies will be made available for additional multipoint control channels.

REGULATORY FLEXIBILITY ACT - FINAL ANALYSIS

43. **Reasons for action and objectives.** The Rule Making action will permit existing subscribers to continue using UHF common carrier channels in a manner which should not significantly interfere with the quality of the service. In addition, it will provide much-needed control frequencies for common carrier wide-area paging and two-way systems. Finally, an additional allocation to Public Safety entities in the Los Angeles area will contribute to mutual aid and interoperability of police and fire entities.

44. **Specific alternatives which could accomplish the same objectives.** We have determined that no specific alternatives are available to meet these objectives.

45. **Issues raised by the public in response to the initial analysis.** No comments were filed in response to our initial regulatory flexibility act analysis. Other public comments that might be pertinent have been addressed in the text of this Order.

ORDERING CLAUSES

46. WHEREFORE, the foregoing premises considered, Parts 22 and 90 of our Rules ARE HEREBY AMENDED as discussed herein and as shown in Appendix 2 below;

47. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX 1

PARTIES COMMENTING IN CC DOCKET 87-120

COMMENTS

A-1 Communications, Inc., Amarillo Telephone Company, Borger Air-Page, Inc.

Bell Atlantic Telephone Companies

Bell South Corporation

City of Glendale, California

Mobile Communications Corporation of America

Metromedia Company

Able Communications

GTE Airfone Incorporated

Alltel Mobile Communications, Inc.

American Mobilphone, Inc.

Ameritech Mobile Services, Inc.

American Petroleum Institute

American SMR Network Association, Inc.

James E. Wiley, d/b/a Auto Phone Company

Bell Communications, Inc.

Cincinnati Bell Telephone Co.

East Ascension Telephone Company

Gencom Incorporated

Hello Pager Company

Hendrix Radio Communications, Inc.

Dean George Hill, P.C. Law Offices

Interelections Corporation

International Mobile Machines Corp.

International Muncipal Signal Assoc. & The International Association of Fire Chiefs, Inc.

McCaw Communications Companies, Inc.

Mobile Communications Corporation of America

MetroNet, Inc.

Metropolitan Mobile Telephone Company, Inc.

Mobilecomm of Los Angeles, Inc.

Mountain Tower
NYNEX Mobile Communications Company, Inc.
NYNEX Telephone Companies
Pacific Bell and Nevada Bell
Arthur K. Peters, Consulting Engineers
Robert L. Mohr d/b/a/ Radiocall Corporation
Southwestern Bell Corporation
Special Industrial Radio Service Association, Inc.
Texpage N.E., Inc.
United Communications, Inc.
Utilities Telecommunications Council

REPLY COMMENTS

American SMR Network Association, Inc.
Bell Atlantic Telephone Companies
BellSouth Corporation
Contemporary Group
Gencom Incorporated
International Mobile Machines Corp.
Mobile Communications Corporation of America
Metromedia Paging Services, Inc.
Motorola, Inc.
NYNEX Telephone Companies (New York Telco & New England Telco)
Pagex
Arthur K. Peters, Consulting Engineers
Southwestern Bell

APPENDIX 2

RULES SECTION

Parts 22 and 90 of the Code of Federal Regulations are amended as follows:

I. Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303), sec. 553 of the Administrative Procedure Act (5 U.S.C. 553), unless otherwise noted.

2. Section 22.501 is amended as follows: paragraphs (k) and (l)(1)-(4) are removed and new paragraph (j)(1)-(6) takes their place; Section 22.501(l)(5) is redesignated Section 22.501(j)(7), and 22.501(j)(7)(i) is amended as follows: Table A is amended by removing reference to Chicago, Cleveland, Detroit, Miami, New York-Northeastern New Jersey, Philadephia, Pittsburgh, and Washington D.C. Table E is removed and reserved. Figures A and B and Tables B, C, D, F, G, and H are unchanged (except for the paragraph designation). Section 22.501(l)(6), (7), (8), and (9) are redesignated Section 22.501(j)(8), (9), (10), and (11), respectively. Section 22.501(l)(10) is redesignated Section 22.501(j)(12) and is revised and paragraph (l) is reserved to read as follows:

Section 22.501 Frequencies

* * * * *

22.501 (j) The channels below are assigned for common-carrier trunked base-to-mobile communications within the listed urban areas.

Boston

Group 1:

470.0125	482.0125
470.0375	482.0375
470.0625	482.0625
470.0875	482.0875

Dallas-Fort Worth

482.0125	485.0125
482.0375	485.0375
482.0625	485.0625

Houston

488.0125	491.0125
488.0375	491.0375
488.0625	491.0625
488.0875	491.0875
488.1125	491.1125
488.1375	491.1375
488.1625	491.1625
488.1875	491.1875
488.2125	491.2125
488.2375	491.2375
488.2625	491.2625

Los Angeles

Group 1:

506.0125	470.0125
506.0375	470.0375

Group 2:

509.0125	473.0125
509.0375	473.0375

San Francisco

Group 1:

488.0125	482.0125

1) only those licensees presently authorized in each market are permitted to file for additional use of these channels.

2) channel usage reports are to be submitted as set forth in subsection (8) of this part. When channel blocking decreases below 25%, the Commission will reassign the channels which are not needed to maintain blocking at

25% or less. The number of channels necessary to maintain blocking below 25% will be determined from the usage reports & Erlang C tables.

3) The transmitter site(s) for base stations(s) shall be located not more than 50 miles from the geographic center of an urbanized area as defined in table A.

4) Mobile stations shall be operated not more than 80 miles from the "Geographic Center" of an urbanized area as defined in table A of this Section, nor beyond a 30-mile radii of the associated base station or stations.

5) Base stations operating on the frequencies available for land mobile use in any listed urbanized area shall afford protection to cochannel and adjacent channel television stations in accordance with the values set out in tables B and C, of this section.

(i) Base stations shall be located a minimum of one mile from local television stations operating on TV channels separated by 2, 3, 4, 5, 7, and 8 TV channels from the television channel in which the base station will operate.

(ii) Mobile units operating on the frequencies available for land mobile use in any given urbanized area shall afford protection to cochannel and adjacent channel television stations in accordance with the values set out in tables D and G of this section.

(iii) The television stations to be protected in any given urbanized area, in accordance with the provisions of paragraph 5 (i) and (ii) of this section, are identified in the Commission's publication "TV Stations To Be Considered in The Preparation of Applications for Land Mobile Facilities in the Band 470-512 MHz." The publication is available at the offices of the Federal Communications Commission at Washington, D.C. or upon the request of interested persons.

6) For antenna heights between 500 feet and 3,000 feet above average terrain the effective radiated power must be reduced below 1 kilowatt in accordance with the values shown in the power reduction graph in Figure A of this Section. For heights of more than 500 feet above average terrain, the distance to the radio path horizon will be calculated assuming smooth earth. If the distance so determined equals or exceeds the distance to the grade B contour of a cochannel TV station, an authorization will not be granted unless it can be shown that actual terrain considerations are such as to provide the desired protection at the grade B contour, or that the effective radiated power will be further reduced so that, assuming free space attenuation, the desired protection at the grade B contour will be achieved.

* * * * *

7)(i) Tables and Figures:

Table A (Urbanized Areas)

Urbanized area	Geographic center	
	N. latitude	W. longitude
Boston, Mass	42° 21' 24"	71° 03' 24"
Dallas, Tex	32° 47' 09"	96° 47' 37"
Houston, Tex	29° 45' 26"	95° 21' 37"
Los Angeles, Calif	34° 03' 15"	118° 14' 28"
San Francisco-Oakland, Calif	37° 46' 39"	122° 24' 40"

* * * * *

(ii) Upon prior coordination with the Broadcast Bureau, departures from the separation distances shown in the tables of this section may be authorized upon a specific engineering showing by an applicant that the protection ratios specified (i.e. 50, 40 or 0.0 dB as may be applicable) will be afforded to the protected television station(s) by the applicant's proposed facilities.

* * * * *

12) The licensees in each market shall measure channel usage at least once every 3 months. These measurements shall be reported to the Commission within 30 days. Measurements shall be taken during the busiest 12-hour periods on 3 days (within a 7-day period) having normal usage. The information should be reported separately for each of the 3 days selected, should be reported by dates, and should disclose the following:

(A) The number of mobile units in service during each of the days specified;

(B) The number of calls completed each hour;

(C) The total number of minutes that the channels (base and mobile) were utilized for transmissions between the base station and land mobile units during each hour;

(D) The average channel usage for the busiest hour for the 3 days being measured; and

(E) Such other additional information which may more accurately reflect channel usage.

3. A new Section 22.501(k) is added to read as follows:

(k) The frequencies listed in part 4 of this section are available for multiple address control of at least four remote base stations operating on the same frequency assignment. Tandem operation of these control frequencies is not permitted.

1) The location of the control station must be within 50 miles of the center city coordinates listed in Part 3 of this section.

2) Control stations are permitted to operate at 1000 watts effective radiated power with an antenna radiation center height above average terrain of 500'.

3) Market Areas

Urbanized area	Geographic center	
	N. latitude	W. longitude
Boston, Mass	42^0 21' 24"	71^0 03' 24"
Chicago, ILL	41^0 52' 28"	87^0 38' 22"
Cleveland, Ohio	41^0 29' 51"	81^0 41' 50"
Dallas, Tex	32^0 47' 09"	96^0 47' 37"
Detroit, Mich	42^0 19' 48"	83^0 02' 57"
Houston, Tex	29^0 45' 26"	95^0 21' 37"
Los Angeles, Calif	34^0 03' 15"	118^0 14' 28"
Miami, FL	25^0 46' 37"	80^0 11' 32"
NY, NY	110^0 45' 06"	73^0 59' 39"
Philadelphia, PA	39^0 56' 58"	75^0 09' 21"
Pittsburgh, PA	40^0 26' 19"	80^0 00' 00"
San Francisco-Oakland, Calif	37^0 46' 39"	122^0 24' 40"
Washington, D.C.	38^0 53' 51"	70^0 00' 33"

4) Boston

Group 1:

470.0125	482.0125
470.0375	482.0375
470.0625	482.0625
470.0875	482.0875
470.1125	482.1125
470.1375	482.1375
470.1625	482.1625
470.1875	482.1875
470.2125	482.2125
470.2375	482.2375
470.2625	482.2625
470.2875	482.2875

Group 2:

473.0125	485.0125
473.0375	485.0375
473.0625	485.0625
473.0875	485.0875
473.1125	485.1125
473.1375	485.1375
473.1625	485.1625
473.1875	485.1875
473.2125	485.2125
473.2375	485.2375
473.2625	485.2625
473.2875	485.2875

Chicago, Cleveland, New York–Northeastern New Jersey

Group 1:

470.0125	476.0125
470.0375	476.0375
470.0625	476.0625
470.0875	476.0875
470.1125	476.1125
470.1375	476.1375
470.1625	476.1625
470.1875	476.1875
470.2125	476.2125
470.2375	476.2375
470.2625	476.2625
470.2875	476.2875

Group 2:

473.0125	479.0125
473.0375	479.0375
473.0625	479.0625
473.0875	479.0875
473.1125	479.1125
473.1375	479.1375
473.1625	479.1625
473.1875	479.1875
473.2125	479.2125
473.2375	479.2375
473.2625	479.2625
473.2875	479.2875

Dallas-Fort Worth

482.0125	485.0125
482.0375	485.0375
482.0625	485.0625
482.0875	485.0875
482.1125	485.1125
482.1375	485.1375
482.1625	485.1625
482.1875	485.1875
482.2125	485.2125
482.2375	485.2375
482.2625	485.2625
482.2875	485.2875

Detroit

Group 1:

482.0125	476.0125
482.0375	476.0375
482.0625	476.0625
482.0875	476.0875
482.1125	476.1125
482.1375	476.1375
482.1625	476.1625
482.1875	476.1875
482.2125	476.2125
482.2375	476.2375
482.2625	476.2625
482.2875	476.2875

Group 2:

485.0125	479.0125
485.0375	479.0375
485.0625	479.0625
485.0875	479.0875
485.1125	479.1125
485.1375	479.1375
485.1625	479.1625
485.1875	479.1875
485.2125	479.2125
485.2375	479.2375
485.2625	479.2625
485.2875	479.2875

Houston

488.2875	491.2875

Los Angeles

Group 1: Group 2:

506.0625	509.0625
506.0875	509.0875
506.1125	509.1125

Miami

470.0125	473.0125
470.0375	473.0375
470.0625	473.0625
470.0875	473.0875
470.1125	473.1125
470.1375	473.1375
470.1625	473.1625
470.1875	473.1875
470.2125	473.2125
470.2375	473.2375
470.2625	473.2625
470.2875	473.2875

Philadelphia

Channel 19	Channel 20

Group 1:

500.0125	506.0125
500.0375	506.0375
500.0625	506.0625
500.0875	506.0875
500.1125	506.1125
500.1375	506.1375
500.1625	506.1625
500.1875	506.1875
500.2125	506.2125
500.2375	506.2375
500.2625	506.2625
500.2875	506.2875

Group 2:

503.0125	509.0125
503.0375	509.0375
503.0625	509.0625
503.0875	509.0875
503.1125	509.1125
503.1375	509.1375
503.1625	509.1625
503.1875	509.1875
503.2125	509.2125
503.2375	509.2375
503.2625	509.2625
503.2875	509.2875

Pittsburgh

Channel 14

470.0125	473.0125
470.0375	473.0375
470.0625	473.0625
470.0875	473.0875
470.1125	473.1125
470.1375	473.1375
470.1625	473.1625
470.1875	473.1875
470.2125	473.2125
470.2375	473.2375
470.2625	473.2625
470.2875	473.2875

San Francisco

Channel 17	Channel 16

Group 1:

488.0375	482.0375
488.0625	482.0625
488.0875	482.0875
488.1125	482.1125
488.1375	482.1375
488.1625	482.1625
488.1875	482.1875
488.2125	482.2125
488.2375	482.2375
488.2625	482.2625
488.2875	482.2875

Group 2:

491.0125	485.0125
491.0375	485.0375
491.0625	485.0625
491.0875	485.0875
491.1125	485.1125
491.1375	485.1375
491.1625	485.1625
491.1875	485.1875
491.2125	485.2125
491.2375	485.2135
491.2625	485.2625
491.2875	485.2875

Washington, D.C.

Channel 18	Channel 17

Group 1:

494.0125	488.0125
494.0375	488.0375
494.0625	488.0625
494.0875	488.0875
494.1125	488.1125
494.1375	488.1375
494.1625	488.1625
494.1875	488.1875
494.2125	488.2125
494.2375	488.2375
494.2625	488.2625
494.2875	488.2875

Group 2:

497.0125	491.0125
497.0375	491.0375
497.0625	491.0625
497.0875	491.0875
497.1125	491.1125
497.1375	491.1375
497.1625	491.1625
497.1875	491.1875
497.2125	491.2125
497.2375	491.2375
497.2625	491.2625
497.2875	491.2875

5) Television protection is required as set forth below:

a) Control stations operating on the frequencies available in subpart 4 of this section shall afford protection to co-channel and adjacent channel television stations in accordance with the values set out in tables B & C of Section 22.501(j)(7), except for channel 15 in New York, and Cleveland, Ohio and Channel 16 in Detroit, Mich., where protection will be in accordance with the values set forth in tables C&F of Section 22.50(j)(7).

b) Control stations shall be located a minimum of one mile from local television staions operating on TV channels separated by 2, 3, 4, 5, 7 and 8 TV channels from the television channel in which the control in which the control station will operate.

c) The television stations to be protected in each urban area, in accordance with the provisions of 5(a) & 5(b) of this section, are identified in the Commission's publications "TV Stations To Be Considered in the Preparaion of Application for Land Mobile Facilities in the Band 470-512 MHz." The publication is available at the offices of the Federal Communications Commission of Washington, D.C. or upon the request of interested persons.

d) For antenna heights between 500 feet at 3,000 feet above average terrain the effective radiated power must be reduced below 1kw in accordance with the values shown in the power reduction graph of Figure A of Section 22.501(j) except for channel 15 in New York, N.Y., and Cleveland, Ohio and channel 16 in Detroit, Mich., where the effective radiated power must be reduced in accordance with figure B. For heights of more than 500 feet above average terrain, the distance to the radio path horizon will be calculated assuming smooth earth. If the distance so determined equals or exceeds the distance to the grade B contour authorization will not be granted unless it can be shown that actual terrain considerations are such as to provide the desired protection at the grade B contour, or that the effective radiated power will be further reduced so that, assuming free space attenuation, the desired protection at the grade B contour will be achieved.

II. Part 90 - Private Land Mobile Radio Services

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303.

2. 47 C.F.R. 90.311 is amended by revising the entry in the Table following paragraph (a) under the Public Safety Pool frequencies on Channel 14 in Los Angeles to read as follows:

§ 90.311 Frequencies.

(a) * * *

FREQUENCIES ASSIGNED IN SERVICE POOLS

Urbanized area (Channel assignment)	Public Safety Pool	
	Fire, Police, Local Government, Highway Maintenance, and Forestry Conservation Radio Service	* * * * *
	Base and Mobile	Mobile
* * * * *		
Los Angeles Ch. 14 . . .	470.0625 to 471.1375 and 506.1375 to 506.2875	473.0625 to 474.1375 and 509.1375 to 509.2875

* * * * *

FOOTNOTES

[1] *In the matter of flexible allocation of frequencies in the Domestic Public Land Mobile Service for paging and other services*, 2 FCC Rcd. 2795 (1987).

[2] *First Report and Order*, CC Docket 87-120, 4 FCC Rcd. 1576 (1989).

[3] 33 Fed. Reg. 10943 (August 1, 1968).

[4] It appears that in six of the MSAs, operations were never begun or ceased soon after inception.

[5] The types of communications so permitted would be any one- or two-way service under the common carrier classification.

[6] In particular, we proposed that the extra channels could be licensed for control/repeater facilities. Another possibility mentioned was reassignment to private land mobile services.

[7] Parties commenting in this docket are listed in Appendix 1. Parties addressing the issues associated with the UHF-TV band frequencies include Telocator, Bell Communications, Gencom, IMSA and IAFC filing jointly, McCaw Communications, Metromedia, MMTC, Mobilecomm of Los Angeles, Motorola, Pagex, Arthur K. Peters, Robert Mohr d/b/a Radiocall, SIRSA, and the Utilities Telecommuncations Council.

[8] Section 331(c)(2) (47 U.S.C. Section 332(c)(2)) of the Communications Act, as amended, forbids dispatch service by common carriers unless such service was authorized *on stations* licensed prior to January 1, 1982. The UHF-TV common carrier stations were not authorized to offer dispatch service. Accordingly, this is not an option for the existing licensees and will not be considered in this proceeding.

[9] "Joint Request," CC Docket No. 87-120, filed by Common Carrier Communications, Inc. and its constituent carriers, and by the Cities of Burbank, Compton, Glendale, Torrance and Whittier, California. Notice to the public of this document was contained in Public Notice, Mimeo No. 2371 (April 12, 1989). A written text of the presentation is in the Docket file.

[10] One commenter expressed the opinion that "[f]ull utilization of these two-way frequencies will occur shortly, probably within the next year." (Comments of Pagex, at page 2.) From a review of the quarterly traffic loading studies, however, we find that in the year since the NPRM was issued, the traffic loading for two-way conventional use as reported by licensees has remained the same or continued to decline.

[11] In the *First Report and Order* in this proceeding we noted that many common carrier two-way paired frequencies in the 150 MHz and 450 MHz bands were being used for one-way paging service. Accordingly, we amended the Rules to permit licensees of two-way common carrier channels to use their channel capacity for common carrier control or any other common carrier point-to-point function, and to resell their channel capacity for mobile common carrier uses. We expect this action will provide additional options to common carriers for control channels. However, we believe that in order to ensure that the necessary control frequencies for common carriers will be available, we are providing additional frequencies specifically designated for this purpose. We also note that frequencies suitable for control purposes were recently made available in the 932-935/941-944 MHz bands. *See Second Report and Order*, Gen. Docket 82-243, 4 FCC Rcd 2021 (1989), 54 Fed. Reg. 10326 (March 13, 1989.) A filing window to accept applications for licensing in this spectrum is expected to be opened in the near future. This spectrum is to be shared by federal government users and non-government private and common carrier users. Here again, we do not believe this spectrum will provide adequate assurance that control channels will be available for common carriers because this spectrum will be heavily shared and is expected to be in high demand for a myriad of different types of operations such as control station alarms and control use by utility companies.

[12] One licensee in the New York area claims that it will lose its investment in the system it has constructed if frequencies are reallocated. However, we have received no traffic loading report from this area since it was authorized in 1984 and accordingly it appears that there are no subscribers on this system.

[13] Telocator proposes that we establish a .05 grade of service rather than a .25 grade of service for remaining two-way communications use. Its reasons for this proposal include the argument that cellular has a better grade of service. We do not believe that it is necessary to allow the extra number of channels needed for a better grade of service on UHF-TV conventional two-way stations. Sufficient two-way communications channels are available under the current allotment to provide a high grade of conventional two-way telephone service. Nevertheless, the number of subscribers has declined and it appears that this trend will continue, irrespective of grade of service. We have taken this into consideration along with the fact that we will review this reallocation within five years. Thus, while the service grade will initially be 0.25, as the number of subscribers decline over the term of the license the service grade will improve. Demand for this service is declining. Finally, Telocator's suggestion was made in the context of its proposal to allow developmental two-way use of these channels, which we have declined to do. *See* paragraph 17, *supra*.

[14] Renewal applications for two-way common carrier use of the UHF-TV channels may be amended within thirty days of this Order's publication in the Federal Register in order to inform this Commission of the specific frequencies for which applicants wish to be renewed, if they have a preference. With these amendments, renewal applicants must also provide a copy of the March, 1989 traffic loading study if it has not already been filed. This traffic loading study must support the number of frequencies requested by the renewal applicant. We may amend the rules promulgated herein to reflect any requests for specific frequencies.

[15] It will not be necessary either to hold a license modification hearing or to await license expiration to make this change, because the licenses granted to two-way common carrier applicants will be conditioned on this annual review and reassignment of unneeded channels.

[16] As indicated in paragraphs 26 - 41, *supra*, in Los Angeles, seventeen frequency *pairs* (taken from the total 24 paired channels available in Los Angeles), will be reallocated to public safety uses, while 6 *split* channels (*i.e.*, three of the total 24 paired channels) will be reallocated for control use. The remaining four paired channels allocated in the Los Angeles area are needed for existing two-way subscribership. These four channels may gradually be made available for common carrier control purposes pursuant to the sunset provision established herein. *See also* discussion of the Los Angeles allocation, *infra* at paragraphs 36-40.

[17] Telocator proposes that we permit control base stations up to 100 miles from the center of each metropolitan area. This proposal goes beyond the scope of our *Notice of Proposed Rule Making* in the instant proceeding. Land mobile use of the 470-512 MHz UHF-TV frequencies is based on a set of technical and geographic restrictions designed to minimize interference to TV broadcasting. Currently, land mobile base stations are restricted to locations within 50 miles of the center of the city. While mobile stations are assumed to operate at up to 80 miles from the center of the city, they are permitted to operate at less power than base stations. Further, interference from mobile stations tends to be transient. Thus, permitting control base stations to operate at a greater distance than currently permitted may pose an increased risk of interference to TV broadcasting. Further, we do not believe it is appropriate to consider such a change until such time as issues pertaining to the implementation of advanced TV systems are further resolved.

[18] One of the alternatives suggested in the NPRM for unused UHF channels was to use them for private radio use. Public safety comes under the general category of private radio. The Petitioners' waiver request was placed on public notice under the docket number of this Rule Making proceeding. Accordingly, we find that the option of reallocating some of this spectrum to public safety in Los Angeles would be a logical outgrowth of our proposal in the Notice.

[19] *Report and Order*, Gen. Docket No. 87-112, 3 FCC Rcd. 905 (1987), establishing a public safety National Plan. *See also Memorandum Opinion and Order on Reconsideration*, Gen. Docket No. 87-112, 3 FCC Rcd 5391 (1988). The National Plan establishes 55 regional planning areas, one of which is the Southern California region. The focus of the regional plans is spectrum allocated in the 821-824/866-869 MHz bands. However, regional planning committees are also to plan use of public safety spectrum in other bands. Under certain conditions, the regional planning committee may make recommendations on reassignment of frequencies in frequency bands below 800 MHz. The Southern California Regional Plan was recently submitted to the Commission but must undergo public comment and Commission review.

[20] Frequencies in the 450-470 MHz band are allocated for land mobile service and are used by public safety and other services. In addition, TV channels 14 (470-476 MHz) and 20 (506-512 MHz) are available for land mobile service in Los Angeles, for use by public safety and other services. TV channel 16 was also allocated in Los Angeles for land mobile service, for use only by public safety services.

[21] We have carefully examined the justification submitted by the municipalities demonstrating their need for additional channels for public safety purposes. Joint Petition for Waiver, Appendix A, (filed May 5, 1988). All of the proposed purposes fall within the public safety radio services subpart of Part 90 of the Rules. *See* Section 90.15, *et seq.*, of the Rules.

[22] In the Joint Request, petitioners requested that all frequencies in the 470-476 MHz band (Channel 14) be reallocated to the municipalities. Channel 14 is presently used as the mobile half of two-way frequency channels by existing two-way common carrier subscribers. Petitioners' request presumed that all existing common carrier subscribers would be discontinued. We have declined to accept the Joint Request and to authorize moving subscribers off the two-way service. Accordingly, four existing paired frequencies must remain in the *status quo*. The municipalities will therefore have ten reconfigured frequency pairs in Channel 14 and seven in Channel 20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARLES P. PASCAL FOIA Control No. 88-205

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 17, 1989

By the Commission:

1. The Commission has before it for consideration an Application for Review of the January 25, 1989 determination of the Private Radio Bureau that certain records in the Amateur Radio license file of Mr. Charles P. Pascal should be supplied to Mr. Pascal pursuant to his request under the Freedom of Information Act (FOIA). 5 U.S.C. § 552. The Application for Review seeks nondisclosure of some of the documents located in Mr. Pascal's file. On our own motion, we have also reviewed all other documents in the file to determine whether disclosure is required by FOIA.

2. This dispute arises from a FOIA request by Mr. Pascal for "all correspondence and allegations" in his amateur radio license file. The documents subject to the request include material submitted to the Commission by others relating to Mr. Pascal and others. For purposes of our analysis, we have divided the documents into two categories: those submitted in 1986; and those subsequently submitted. We have determined that all of the records were compiled for law enforcement purposes within the meaning of Exemption 7 of the FOIA. 5 U.S.C. § 552(b)(7).

3. As to the records submitted in 1986, the documents were not submitted to the Commission under circumstances from which it could be inferred that the source expected confidentiality. *See* S. Conf. Rep. No. 1200, 93rd Cong., 2d Sess. 13, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6285, 6291. As to the documents submitted after 1986, however, we have determined that, with one exception, they are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(D). These documents will be withheld in their entirety.

4. One of the otherwise releasable documents, a July 3, 1986 letter to the Long Beach Field Office, contains references of a personal nature regarding a person or persons other than Mr. Pascal. Therefore, pursuant to 5 U.S.C. § 552(b)(7)(C), that material is being deleted from the copy of the document being supplied.

5. Accordingly, IT IS ORDERED, That the Application for Review IS GRANTED IN PART.

6. The applicant for review may seek judicial review of this decision pursuant to 47 U.S.C. § 402. *See* 5 U.S.C. §§ 701 - 706. Pursuant to 47 C.F.R. § 0.461(h)(4), the records will not be released for ten working days to afford an opportunity to seek a judicial stay of this action.

7. With regard to the portions of the documents withheld pursuant to 5 U.S.C. § 552(b)(7)(C), (7)(D) the requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION2

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SUN COMMUNICATIONS, INC. File No. 10232-CL-P-581-A-88

For construction authority to establish a new cellular system to operate on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the North Dakota 2--Bottineau Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1989; Released: August 17, 1989

By the Chief, Common Carrier Bureau:

1. Sun Communications, Inc. (Sun) won the non-wireline lottery for the North Dakota 2--Bottineau Rural Service Area (RSA). By letter dated May 2, 1989, the Mobile Services Division (MSD) dismissed Sun's application as unacceptable for filing[1] because Sun failed to submit a full-size 1:250,000 scale map as required by Section 22.903(a) of the Commission's Rules.[2] Sun has filed a petition for reconsideration, and a supplement to that petition, in which it seeks reinstatement of its application. No opposition pleadings have been filed. We conclude that Sun's application should not have been dismissed solely because it failed to submit a map drawn to the required scale. Nevertheless, we have discovered another defect in the application which requires its dismissal.

I. SUN'S CONTENTIONS

2. Sun claims that there is a conflict between two Commission Rules as to what scale map should be submitted by cellular radio applicants. Sun alleges that this rule conflict has confused applicants, and therefore an applicant which files a map complying with one of these rules should be allowed to amend its application to provide the correct scale map. Sun observes that Section 22.923(a)(1) of the Rules provides that the map exhibit in a cellular application shall include an 8 1/2 by 11 inch reduced copy of a 1:250,000 or 1:500,000 scale map depicting the complete RSA and any Cellular Geographic Service Areas (CGSAs) for which the application has been filed.[3] Notwithstanding, Sun admits, Section 22.903(a)(1) of the Rules, which focuses on the filing of initial cellular applications for the RSAs, states that each CGSA must be drawn on one or more U.S. Geological Survey Map(s) with a scale of 1:250,000. Sun asserts that its filing of a full-size map with a scale of 1:500,000 is consistent with its use of the same scale map for producing the reduced copy of its full scale map that was contained in the microfiched application that it initially filed. Lastly, Sun argues that it should be allowed to supplement its application by filing a minor, informational amendment which includes a map drawn to the 1:250,000 scale.

II. DISCUSSION

3. In its *First Report and Order, Amendment of the Commission's Rules for Rural Cellular Service*, 60 Rad.Reg.2d (P&F) 1029, 1037 (1986), the Commission determined that the public interest would be served by generally adhering to the application procedures prescribed for MSA markets 121-305 when processing RSA applications. The Commission, in so holding, stated that adoption of these rules would ensure that cellular service was provided to rural America on an expedited basis. *Id.* at 1040-41. Furthermore, in *Cellular Lottery Reconsideration Order*, 101 F.C.C. 2d 577, 604 (1985), the Commission indicated that these lottery selection procedures were being adopted to streamline the licensing process by reducing the incentive for applicants to file "sham" or speculative applications. In its *Cellular Lottery Further Reconsideration Order*, 59 Rad.Reg.2d (P&F) 407, 410 at n.16 (1985), the Commission established the "letter perfect" standard for evaluating cellular applications, and required that all cellular applications be filed in a "letter perfect" condition. Failure to adhere to this standard would result in an application being dismissed as unacceptable for filing. Only the information required for pre-screening prior to the lottery is subject to the letter perfect standard. *See, e.g., Timothy Roper*, 4 FCC Rcd 4070 (1989). Even though an application may have satisfied the "letter perfect" standard and passed through the initial intake stage for processing cellular applications, defects may still be found which would render the application defective and unacceptable for filing, thereby leading to its dismissal. *REM Communication*, 3 FCC Rcd 3705 (1988).

4. Section 22.20(a)(1) of the Commission's Rules states that an application will be unacceptable for filing if, *inter alia*, the application is defective with respect to completeness of answers to questions or informational showings. Section 22.20(a)(2) of the Rules provides that an application will be deemed unacceptable for filing if the application does not comply with the Commission's Rules, regulations, or specific requirements for additional information. An application which is unacceptable for filing is returned to the applicant. Nevertheless, minor errors in an application that has been found acceptable for filing may be corrected by amendment. *See, e.g., Timothy Roper*, 4 FCC Rcd 4070 (1989). In the case of a cellular application, amendments to the tentative selectee's application cannot be filed until after the lottery has occurred. *See* Section 22.918(b) of the Rules. Moreover, a defective cellular application may not be amended after the filing date or after the lottery to bring it into compliance with the Commission's Rules. *See REM Communication*, 3 FCC Rcd 3705 (1988) (*REM*).

5. First, we must decide whether Sun's submission of a 1:500,000 scale map with its paper application is consistent with the Rules. At the outset, we observe that Section 22.923(b) of the Commission's Rules requires applicants seeking authority for initial systems to file two microfiche copies of their applications with the Commission. Along with the microfiche copies of the application, applicants are required to submit a reduced copy of a 1:250,000 or

1:500,000 scale map depicting the complete RSA and all CGSA(s) therein. *See* Section 22.923(a)(1) of the Rules. After the Commission holds a lottery to determine which applicant for a particular frequency block (A for non-wireline, B for wireline) in a particular RSA is the winner, the applicant selected first in the lottery must file the original and two paper copies of its application with the Commission. At issue here is whether the Rules require an applicant to submit, with the original and two paper copies, an exhibit including a map depicting the CGSA on a scale of 1:250,000. *See* Sections 22.903(a)(1) and 22.923(a)(1) of the Rules.

6. We do not perceive any conflict between the provisions of Sections 22.903(a)(1) and 22.923(a)(1) of the Commission's Rules and therefore reject Sun's contentions in this regard. Sections 22.903(a)(1)[4] and 22.923(a)(1)[5] clearly require RSA applicants to submit maps on a scale of 1:250,000 with the paper application. Section 22.903(a)(1) requires that the applicant draw its CGSA on a U.S. Geological Survey map with a scale of 1:250,000. Additionally, the applicant must depict each base station site within each CGSA and the respective 39 dBu contours of those base stations, but need not depict the entire RSA. Section 22.923(a)(1), which prescribes the content and form of RSA applications, specifically directs each applicant to include as an exhibit to its application a map of the proposed CGSA. The rule states that: "This exhibit shall contain all the information specified in Section 22.903(a)(1)." Thus, Section 22.923(a)(1) incorporates by reference the requirements of Section 22.903(a)(1). In addition, Section 22.923(a)(1) requires that the exhibit "shall include an 8 1/2 by 11 inch reduced copy of a 1:250,000 or 1:500,000 scale map, depicting the complete RSA and any CGSA(s) therein." (Boundaries of the RSA, CGSA(s) and 39 dBu contours must also be clearly indicated.) We allow the use of the 1:500,000 scale map for the reduced copy of the map because RSAs cover broad geographic areas and it would be difficult to show some of the RSAs on a map drawn to a 1:250,000 scale.

7. In contrast, we require the submission of an actual 1:250,000 scale map with the paper application so that each CGSA can be depicted in sufficient detail that our engineering staff can process the relevant application after the lottery has occurred. In instructing applicants on the filing procedures for these maps, Section 22.923(a)(1) provides that: "The full-size map need not be included in the microfiche copies of the application, but must be present in the original application from which the microfiche is made. For microfiching purposes the reduced map is sufficient." Given that Section 22.923(a)(1) requires the submission of two maps, with the submission of the reduced map being sufficient for microfiching purposes, the phrase "full-size map" logically refers to the 1:250,000 scale map, not the reduced map which may be prepared on a scale of 1:500,000. Thus, Sun's submission of a 1:500,000 scale map with its paper original application is not consistent with the Rules.

8. Second, we must consider whether, given Sun's noncompliance with the rules, dismissal of its application is warranted. The Commission has issued several decisions with respect to the acceptability for filing of applications containing defective maps. In *REM*, *supra*, the Commission dismissed an application pursuant to Section 22.20 of the Rules as unacceptable for filing because the map submitted by the applicant was illegible and failed to provide clear latitude, longitude or scale markings. The Commission held that such a map prevents the application from being processed and reviewed by staff engineers. In *REM*, the Commission cited its *Order on Reconsideration* in *Petitions for Reconsideration of the Return of Round IV Cellular Applications for Having Defective Maps*, FCC 86-37 (released January 24, 1986) (*Round IV Maps*), in which one application was dismissed for failure to include a map of the required scale[6] and another group of applications was dismissed for failure to indicate latitude and longitude markings on their maps. The Commission in *REM*, *supra*, distinguished its decision in *U. S. West NewVector*, 2 FCC Rcd 543 (1987) (*NewVector*), in which the Commission reversed an MSD order dismissing an application because the scale was not printed on the face of the map. In *NewVector*, the Commission deemed dismissal of the application to be "unduly harsh" because the map scale was referenced elsewhere in the application and the staff engineers were still able to evaluate the applicant's engineering proposal. In *Timothy Donald Engelgau*, 2 FCC Rcd 543 (1987) (*Engelgau*), *aff'd sub nom. Queen City Cellular Communications* v. *F.C.C.*, 859 F.2d 241 (D.C.Cir. 1988), the Commission upheld the grant of an application which was filed with a map on a scale of 1:500,000. The application in question had included a request for waiver of Sections 22.903(a) and 22.913(a)(2) of the Rules, which required the submission of a map with a scale of 1:250,000. The basis for the waiver request was that the applicant could not obtain the correct scale map from the U.S. Geological Survey. When Engelgau filed his Section 1.65 amendment to his application, he submitted the map with the proper scale, which was accepted by the processing staff.

9. Sun's map submitted with its paper original application on the 1:500,000 scale was legible, with clear latitude, longitude and scale markings depicted on the face of the map.[7] The scale of the map, while not the optimum for processing purposes, does not, by itself, prevent the staff from processing the application. Thus, we conclude that the improper map scale constitutes a minor defect in Sun's application, which does not render the application unacceptable for filing under Section 22.20 of the Rules. Under the facts of this case, an amendment submitting a map on a scale of 1:250,000 would be a minor amendment, as allowed by Section 22.918(b) of the Rules. The 1:250,000 scale map submitted by Sun as a Section 1.65 amendment depicts the identical proposed service area and site locations as the map with a scale of 1:500,000 and there are no engineering changes or adjustments to the CGSA. The Commission's decisions in *REM* and *Round IV Maps* are clearly distinguishable because the maps in those cases could not be used by the staff to process the applications. In light of the foregoing, we conclude that the MSD should not have dismissed Sun's application based solely upon the filing of a 1:500,000 scale map.[8]

10. We would ordinarily reinstate Sun's application and allow it to file a minor amendment to its application, submitting a full size map with a scale of 1:250,000 if no other fatally defective error were present. Our review of Sun's application in the context of Sun's petition for reconsideration reveals that Sun's application should have been dismissed because Sun did not sign the certification statement printed on the transmittal sheet filed with its initial application. The Transmittal Sheet is provided by the Commission and contains a printed certification statement which must be signed by the authorized representative of each applicant. *See* Section 22.923(b) of the Rules.

By signing the certification statement, an applicant certifies that its application is complete in every respect and that the applicant is the only real party in interest to the application.

11. Thus, we must dismiss Sun's application at this time for failure to comply with the Commission's "letter perfect" standard. The "letter perfect" standard applies to certain specified pre-lottery filing requirements. Thus, each applicant for a cellular authorization is required to certify to the completeness of its application, state the applicant's name and the market name, market number and frequency block for which it is applying, and to provide two properly identified microfiche copies of its executed application at the time of filing. *Johnstown Cellular Communications Co.*, 1 FCC Rcd 1164 (Com.Car.Bur. 1986), *aff'd, Jacksonville Cellular Telephone Company*, 3 FCC Rcd 5386 (1988); *Timothy Roper*, 4 FCC Rcd 4070 (1989). *See also Satellite Cellular Systems*, 4 FCC Rcd 4477 (Com. Car. Bur. 1989). Failure to comply with any of the "letter perfect" requirements results in the dismissal of the relevant application, no matter when the defect is discovered. *See, e.g., Central Illinois Cellular Limited Partnership*, 2 FCC Rcd 436, 437 (Com. Car. Bur. 1987), and Section 22.26 of the Commission's Rules. This kind of defect cannot be cured by amendment. *See, e.g., Midwest Mobilephone of Michigan, Inc* 3 FCC Rcd 3933, 3934 (1988). Section 22.923(b)(7) of the Commission's Rules provides the precise language for the statement to which each cellular applicant for an RSA must certify and specifically requires that a cellular applicant must certify to the contents of that statement by signing the statement and printing the name and title of the person signing the statement. Although Sun provided the name of its President and his title, the certification statement was not signed. In this light, Sun's application has clearly failed the "letter perfect" standard and must be dismissed as unacceptable for filing. *See, e.g., Clyde W. Pierce*, 4 FCC Rcd 2378 (1989) (application dismissed as defective for failure to properly sign and certify the application).

12. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Sun Communications, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects and the MSD's dismissal of Sun's application IS AFFIRMED for the reasons set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 22.20 of the Commission's Rules explains that a defective application may be dismissed as unacceptable for filing.

[2] The MSD letter also observed that Sun's application might be defective for other reasons, but in an effort to best utilize the MSD's limited resources, once an application has been found unacceptable for filing for one reason, the processing of that application ceases.

[3] Section 22.903 (a) of the Rules states that the CGSA of a cellular system shall be defined by the applicant as the area intended to be served. Section 22.903(a)(1) explains that an applicant may propose multiple CGSAs within an RSA.

[4] Section 22.903(a)(1) states, in pertinent part:

> . . . The CGSA must be drawn on one or more U.S. Geological Survey map(s) with a scale of 1:250,000.

[5] Section 22.923(a)(1) states, in pertinent part:

> This exhibit shall contain all the information specified in Section 22.903(a)(1). In addition, this exhibit shall include an 8 1/2 by 11 inch reduced copy of a 1:250,000 or 1:500,000 scale map, depicting the complete RSA and any CGSA(s) therein. . . . The full-size map need not be included in the microfiche copies of the application, but must be present in the original application from which the microfiche is made. For micro-fiching purposes, the reduced map is sufficient.

[6] The application in question was filed by Celcom, Inc. The Commission stated that the map was significantly smaller than that prescribed, "rendering engineering calculations on the submitted map virtually impossible."

[7] Section 22.2 of the Rules defines a map as follows:

> Maps. A representation on a flat surface of a part or the whole of the earth's surface. *All maps submitted under this part shall include latitude, longitude and scale.* (Emphasis added.)

[8] We should note, however, that while a 1:500,000 scale map is usable for processing purposes, a smaller scale map may not be and may render the application patently defective. *See Round IV Maps*, slip op. at para.4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

COLUMBIA CELLULAR PARTNERSHIP — File No. 92286-CL-P-278-A-86

For authority to construct and operate a cellular system in the Domestic Public Cellular Radio Service to serve the Columbia, Missouri Metropolitan Service Area (MSA)

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1989; Released: August 17, 1989

By the Chief, Mobile Services Division:

1. Daniel J. Kehoe, Sr., James F. Kehoe Joint Venture, and Excellence One Partnership (hereinafter "Petitioners") have filed a petition to deny the captioned application filed by Columbia Cellular Partnership ("Columbia Cellular") for authority to construct a Domestic Public Cellular Radio Service (DPCRS) in the Columbia, Missouri Metropolitan Service Area (MSA). Columbia Cellular has filed an Opposition to the petition.

I. BACKGROUND AND CONTENTIONS

2. On November 24, 1986, the application of Eunice E. Singleton (Singleton) was selected as the lottery winner for the Columbia, Missouri MSA, Market No. 278. Willie T. Robertson (Robertson) was the second ranked applicant, and Jean L. Siegel (Siegel), was the ranked third. On March 25, 1987, Siegel filed a petition to deny the Singleton and Robertson applications. On May 31, 1989, the Singleton and Robertson applications were designated for hearing before an administrative law judge. *Theodore M. Jones*, 3 FCC Rcd 3555 (Com. Car. Bur. 1988). Singleton's application was subsequently dismissed with prejudice at Singleton's request. *Eunice E. Singleton*, FCC 88M-4050, Mimeo No.7214 (released November 25, 1988). Robertson dismissed its application with prejudice by letter dated November 29, 1988.

3. Siegel was named the new first ranked applicant for the Columbia, Missouri MSA in *Public Notice*, Report No. CL-89-52 (released December 14, 1988). Siegel filed a Section 1.65 amendment to its application on December 27, 1988, substituting a settlement partnership, Columbia Cellular Partnership (Columbia Cellular), as the applicant. The amendment states that Siegel holds at least a 50.01% ownership interest in Columbia Cellular, and lists the minority partners holding equal ownership interests of not more than .99%. Columbia Cellular was named the tentative selectee for the Columbia, Missouri MSA on February 9, 1989. *Public Notice*, Report No. 89-85 (released February 9, 1989).

4. Petitioners argue that the Section 1.65 amendment, filed by Siegel substituting Columbia Cellular as the applicant, reflects a change in ownership which constitutes a major amendment subject to our cut-off rules. Section 22.23(g)(4) of the Rules, Petitioners assert, does provide an exemption from the cut-off rules for bona fide settlement groups. However, Petitioners argue, this exemption is only available for settlement groups formed prior to the lottery, and thus, is not available for the settlement described in the amendment submitted by Columbia Cellular. In support of their argument, Petitioners state that Siegel joined a pre-lottery settlement group for the Columbia, Missouri MSA in which the Petitioners hold partnership interests. The Petitioners state that Siegel has repudiated this pre-lottery agreement. Petitioners further maintain that the Section 1.65 amendment reflects a partnership agreement reached among only some of the parties to the original pre-lottery agreement and was formed after the lottery was conducted. Accordingly, Petitioners argue that unless the application is amended to permit participation by all parties to the pre-lottery agreement, the application contains an impermissible major amendment and must be dismissed as defective. Petitioners further argue that the amendment's failure to disclose the existence of the pre-lottery agreement and all of the minority partners' interests violates Sections 22.918(b) and 1.65 of the Rules.

5. In opposition, Columbia Cellular states that the substitution of the Columbia Cellular partnership as the applicant does not constitute a major amendment, and that therefore, the Section 1.65 amendment is not governed by Section 22.23(g)(4) of the Rules. Rather, Columbia Cellular asserts, the Columbia Cellular partnership was formed pursuant to Section 22.921 of the Rules which provides that, for non-wireline applicants beyond the top 120 MSA markets, an interest of less than one percent in mutually exclusive applications for the same market is non-cognizable. Columbia Cellular asserts that agreements whereby the original applicant substitutes a partnership entity for the winning application, while retaining a majority interest in the application, are in conformance with Sections 22.918 and 1.65 of the Rules, and have been routinely granted by the Commission. Accordingly, Columbia Cellular states that the petition to deny lacks merit and should be summarily dismissed.

II. DISCUSSION

6. In *Cellular Lottery Reconsideration Order*, 101 FCC 2d 577 (1985), the Commission allowed non-wireline applicants for MSA markets beyond the top 120 to enter into partial settlement agreements, either before or after filing their applications.[1] Applicants are required to amend their applications to reflect partial settlement agreements. *See* Section 22.918(c)(1) of the Rules. The amendment may be a major or minor one depending upon whether the partial settlement involves a substantial change in the ownership or control of the applicant. *See* Section 22.23(c)(4) of the Rules. An application is considered to be newly filed and subject to our cut-off rules, if it is amended by a major amendment.[2] *See* Section 22.23(g) of the Rules.

7. A settlement agreement which involves a substantial change of the ownership or control of the application is considered a major amendment subject to our cut-off rules. However, Section 22.23(g)(4) of the Rules provides an exemption from the cut-off rules for amendments which reflect a substantial change in ownership or control as a result of an agreement between lottery applicants under Section 22.29 of the Rules. The exemption is available for actual *bona fide* settlement agreements that existed prior to the lottery. In addition, this exemption is applicable to a "post-lottery broadening" of a settlement agreement that was formed prior to the lottery. *Guidelines for Settlements and Changes in Ownership of Cellular Systems*, 59 Rad. Reg. 1450 (1986).

8. In this case, the change in ownership or control of the application is not substantial. Siegel has retained a majority (50.01%) ownership interest in Columbia Cellular. Moreover, the interests of the the minority partners in this application are not considered to be cognizable by the Commission.[3] Therefore, we find that the Section 1.65 amendment at issue is not a major amendment, that the provisions of Section 22.23(g)(4) of the Rules are not applicable, thus, that an exemption from the cut-off rule is not necessary. We further find that Siegel's amendment conforms with our Rules governing minor amendments to applications for cellular MSA markets beyond the top 120.

9. In addition, we believe that the dispute between Siegel and the Petitioners regarding the exclusion of some members to the pre-lottery settlement agreement is a private contractual matter and thus is not properly a matter to be resolved in this forum. *See Ellis Thompson*, 3 FCC Rcd 3962 (1988); *See Rodney A. McDaniel*, 4 FCC Rcd 1736 (Com. Car. Bur. 1989). As the Commission has previously stated, we will not enforce or interpret settlement agreements among cellular applicants. *See Ellis Thompson, supra; Guidelines for Settlement and Changes in Ownership of Cellular Systems*, 59 Rad. Reg. 2d (P&F) 1450 (Com. Car. Bur. 1986).

10. Accordingly, we find that Columbia Cellular Partnership is qualified to hold the licensee for Columbia, Missouri MSAs . We also find that grant of the application will serve the public interest, convenience and necessity.

III. ORDERING PARAGRAPHS

11. Therefore, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of Columbia Cellular Partnership, File No. 92286-CL-P-278-A-86 IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Columbia, Missouri MSA and is conditioned upon coordinating with the current and future co-channel licensees in the area outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dbu contours to eliminate any interference due to an extension.

12. IT IS FURTHER ORDERED, that the Petition to Deny filed by David J. Kehoe, Sr., James F. Kehoe Joint Venture, and Excellence One Partnership IS DENIED.

13. IT IS FURTHER ORDERED that all non-wireline cellular applications in the Columbia Missouri MSA, other than the application of Columbia Cellular Partnership ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Any arrangement among fewer than all of the applicants in a market that provides reciprocal interests in the applications of the parties to the arrangement is considered a "partial settlement." A partial settlement also includes the type of agreement present in this case,, the "alliance agreement." In this type of settlement, each party to the alliance agrees that if it wins a particular market it will retain at least a 50.1% ownership interest in the application, and that the other parties to the agreeement will each obtain a maximum interest of 0.99% in the application. *See Third Report and Order*, 4 FCC Rcd 2440 (1988).

[2] Section 22.31(d) of the Rules provides that an application will be returned with prejudice if not filed by the cut-off date. Major amendments that are not exempt under Section 22.23(g) are considered newly-filed applications and are cut-off if filed after the prescribed date for the filing of applications.

[3] In *Cellular Lottery Rule Making*, 98 FCC 2d 175, 215-219 (1984), the Commission adopted a rule which prohibits parties from having ownership interests in more than one application for the same MSA, NECMA, or RSA market except that interests of less than one percent are non-cognizable. *See* Section 22.921 of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, INC. (Assignor) File No. 20308-CD-AL-01-89

For Authority to Assign DPLMRS Station KCA207, Andover, Massachusetts

to

RADIO TELEPHONE SYSTEMS, INC., (Assignee)

and

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, INC. File No. 26797-CD-R-01-88

For Renewal of License of DPLMRS Station KCA207, Andover, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1989; Released: August 17, 1989

By the Chief, Mobile Services Division:

1. New England Telephone and Telegraph Company, Inc. (New England) has filed a renewal of license application for Station KCA207, File No. 26797-CD-R-01-88; and New England and Radio Telephone Systems, Inc. (Radio Telephone) have filed a joint application, File No. 20308-CD-AL-01-89, requesting consent to the assignment of, among others, the license for Station KCA207[1] from New England to Radio Telephone. Radio Call Company, Inc. (Radio Call), a competing paging operator, filed a Petition to Deny the application for assignment and the application for renewal of license for Station KCA207.[2] New England filed an Opposition to the petition, to which Radio Call has filed a Reply.[3] Radio Telephone filed a Motion for Partial Grant of Applications.[4]

I. CONTENTION OF THE PARTIES

2. The petitioner, Radio Call, operates Station KNKK486 on frequency 454.25 MHz at Boston and Paxton, Massachusetts. Its petition alleges that monitoring of applicant New England's Station KCA207 from September 15, 1988 to November 18, 1988 (a period of 65 days)[5] revealed that the frequency was not being used and that New England has abandoned operation of the station. Radio Call alleges that the station has been silent for more than the 90 day period contemplated by Section 22.303 of the Commission's rules[6] and that it failed to provide semi-hourly call sign identification as required by Section 22.213 of the rules.[7] It alleges that New England applied for renewal of the station's license to enable it to sell the station. Radio Call asks that the assignment and renewal applications for Station KCA207 be denied or designated for hearing because New England should not profit from the misuse of its authorization.

3. New England contends that the fact that a single frequency within a multi-channel system[8] was not operating during a given time frame does not demonstrate abandonment as alleged by Radio Call. It notes that Radio Call's petition does not say that the monitoring was continuous, and does not support the allegation that Station KCA207 had not been operating for 90 continuous days as required by the rules. New England contends that non-operation for less than 90 days would not constitute permanent discontinuance and would not constitute a reason for cancellation of its license. Further, New England contends that the coordinates of the base station tower cited in the Higginbottom statement are incorrect and could account for the inaccuracy of his statement. New England states that an alarm connects its system to the control center and the control center is manned at all times. A statement from its operations manager indicates that during the period in question there were sporadic failures, but they were not continuous and were corrected. Lastly, New England contends that Section 22.213 of the rules does not require regular semi-hourly call sign identification and that in the event of temporary non-operation there is no need for station identification.[9]

4. In reply, Radio Call submits a statement from James D. Pickard[10] stating that he has been monitoring Station KCA207 since March 1988. He asserts that the station was silent from March through November 1988, and that after mid-December 1988, although an occasional voice was heard, the overall usage of the frequency was inconsistent with an active paging station. Radio Call argues that New England has not demonstrated that even one paging message was transmitted during the September 1988 to January 3, 1989 time period and that Station KCA207 is not functioning as a paging station.

II. DISCUSSION

5. As a result of the allegations concerning the operation of Station KCA207, we requested that the Commission's Field Operations Bureau's (FOB) Boston Office inspect the station to determine if it had been silent during the period indicated in the petition. FOB monitored Station KCA207 and conducted an inspection of the station on March 15, 1989. Station KCA207 was monitored on March 13, 1989 from 2 p.m.- 4 p.m., and on March 14, 1989, from 7 a.m.- 9 a.m. and 11 a.m.- 12:30 p.m. During this time one transmission (an unsuccessful telephone call) was heard, in addition to automatic semi-hourly station identifications. The station is authorized for 230 mobile units and approximately 50 are in use. Based on the station logs, the inspection revealed that station KCA207 had not been abandoned; it was not silent for 60 days during the period March 1988 through November 1988; and the station was technically capable of operating in accordance with the station license. The inspection report indicated that no technical rules were violated.

6. In addition, the Mobile Services Division sent a letter of inquiry to New England concerning the operation of Station KCA207 during the period indicated in the petition.[11] In response to the MSD letter, New England indicates that station KCA207 was not operating every day during the period March 1988 to December 1988.[12] The response notes that there were three periods of voluntary outages. One outage occurred for eight hours on July 16, 1988, due to the introduction of a new areas code in Lawrence, MA that required an extensive wiring change in the control terminal equipment. The second period occurred during August 1988 while the control circuits were being converted to a new configuration as a result of decommissioning of a Central Office building in Lawrence, MA. The third occurred during November 1988 when the system control equipment was being relocated within the Lawrence, MA Central Office Building. The response also notes that the seven involuntary system outages were attributable to equipment failure, power outages, etc. While New England could not provide alarm records for the period prior to September 1988, it estimates that the incidences of alarms during the period March to September 1988 was similar to the period noted in New England's opposition. New England also provided data indicating that Station KCA207 did carry mobile traffic during each month from March to December 1988.

7. Based upon FOB's inspection report, New England's response to the MSD letter, and a review of all the pleadings, we find that Radio Call's petition is without merit. The inspection report, based on the station logs, revealed that Station KCA207 has not been abandoned and was not silent continuously throughout the time period alleged by Radio Call.[13] In addition, New England's response to our letter explains the causes for the periods during which New England was not operating. In light of the foregoing, Radio Call has failed to present any grounds for denying the assignment application or for conducting a hearing to determine whether granting these applications would serve the public interest. Radio Call also alleged that Station KCA207 was not conducting the proper semi-hourly station identification signals. The inspection noted that Station KCA207 has an automatic station identification system and that, contrary to Radio Call's allegation, it was found to be functioning properly and in accordance with the rules.

8. We find that Radio Telephone Systems, Inc. is qualified to hold the licenses involved in the captioned assignment application. We also find that approving these applications will serve the public interest, convenience, and necessity.

III. ORDERING PARAGRAPHS

9. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the captioned assignment application filed by New England Telephone and Telegraph Company, Inc. and Radio Telephone Systems, Inc. IS GRANTED.

10. IT IS FURTHER ORDERED, that the Petition to Deny the captioned assignment application filed by Radio Call Company, Inc. IS DENIED.

11. IT IS FURTHER ORDERED, that the Petition to Deny the renewal application for Station KCA207, File No. 26797-CD-R-01-88 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The application for assignment included the following station licenses.

File Number	Call Sign	Location
21553-CD-ML-04-79	KCA207	Haverhill, Massachusetts
26468-CD-ML-03-83	KCA228	Providence, Rhode Island
25209-CD-ML-01-80	KCA669	Paxton, Massachusetts
21516-CD-ML-03-80	KCA670	Springfield, Massachusetts
25061-CD-ML-01-83	KCA671	Waltham, Massachusetts
21266-CD-ML-01-79	KCB897	Portland, Maine
23280-CD-R-01-78	KCB898	Lewiston, Maine
23281-CD-R-01-78	KCB899	Manchester, Maine
21699-CD-ML-02-82	KCC261	Bangor, Maine
22342-CD-P/ML-01-85	KCC262	Rockland, Maine
23284-CD-R-02-78	KCC267	Goofstown, New Hampshire
21403-CD-ML-02-79	KCC268	Adams, Massachusetts
23285-CD-R-01-78	KCC269	Hodgdon, Maine
23286-CD-R-01-78	KCC470	Presque Isle, Maine
23287-CD-R-01-78	KCC472	Dover, New Hampshire
22721-CD-R-01-78	KCC473	Burlington, Vermont
232A8-CD-R-01-78	KCC487	Boston, Massachusetts
23289-CD-R-01-78	KCC787	Barnstable, Massachusetts
22050-CD-ML-01-82	KCC800	Brockston, Massachusetts
23291-CD-R-01-78	KCC801	Acushnet, Massachusetts
22807-CG-R-03-79	KCC793	Waltham, Massachusetts

[2] New England's renewal application was listed on Public Notice No. PMS-88-40 (June 29, 1988). Section 22.30(a)(4) of the Commission rules requires that any petition to deny be filed within 30 days after the date of the public notice. Radio Call's petition against New England's renewal application is untimely filed, however, we note that it raises the same issues as the petition to deny the assignment.

[3] New England filed a Motion to Strike a portion of Radio Call's reply and responsive pleadings were filed by both parties.

[4] In *Order*, 4 FCC Rcd 5256 (1989), the Mobile Services Division granted New England's Motion for Partial Grant of Applications. The motion requested that the twenty uncontested applications for assignment be granted and the one contested station KCA207 be held in abeyance pending resolution of Radio Call's petition.

[5] This information was submitted in a letter to Radio Call from David Higginbottom of Interstate Communications, Inc. Mr Higginbottom stated that he was located approximately 7500 feet from New England's system at the time he monitored New England's 454.625 MHz frequency.

[6] Section 22.303 of the rules provides in pertinent part that:

> If a station . . . discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. For the purpose of this section, any station which has not operated for 90 continuous days is considered to have been permanently

> discontinued, unless the applicant has notified the Commission otherwise prior to the expiration of the 90 day period . . . .

[7] The petition referred to Section 22.313 of the rules as the station identification rule, but this was corrected in the opposition to read Section 22.213 of the rules.

Section 22.213(a) of the rules provides in pertinent part that:

> (a) each station . . . shall identify itself by transmitting its assigned call sign in connection with each communication or excahnge of communication. In the event of a prolonged series of communications, a station shall identify itself at lease every half hour . .

[8] New England notes that it is licensed to operate a multichannel, multi-location system employing the 152.570 MHz and 454.625 MHz frequencies (File No. 5033-C2-P-73).

[9] *In the Matter of Revision and Update of Part 22 of the Public Mobile Radio Service Rules,* CC Docket No. 80-57, para. 162 (released December 19, 1983).

[10] James D. Pinkard, a FCC licensed engineer, is a service manager of C & B Electronics in Auburn, New Hampshire.

[11] Letter from the Mobile Services Division to New England Telephone & Telegraph Company (June 23, 1989).

[12] Letter from New England Telphone & Telegraph Company to Mobile Services Division (July 7, 1989).

[13] We are not persuaded by the affidavits of Mr. Pickard. Although the affidavit avers that he monitored transmissions over Station KCA207, he does not indicate how extensively he monitored, or *e.g.,* for what periods of time or on what dates. In addition, he admits that he did detect transmissions after mid-December 1988. In these circumstances, we conclude that petitioner has not provided sufficient evidence to overcome the evidence of operation contained in the station records, and the explanations provided in response to our letter.

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

MM Docket No. 87-65

In re Applications of

THE BALTIMORE RADIO SHOW, INC.	File No. BPH-860102NT
FIRST STATE BROADCASTING, INC.	File No. BPH-860102NX
KENT COUNTY RADIO LIMITED PARTNERSHIP	File No. BPH-860102NZ
SMYRNA BROADCASTERS LIMITED PARTNERSHIP	File No. BPH-8601020A
CENTRAL DELAWARE BROADCASTING CO.	File No. BPH-860102OB

For Construction Permit
for a New FM Station at
Smyrna, Delaware

Appearances

Harry R. Shriver, pro se, on behalf of The Baltimore Radio Show, Inc.; *David M. Hunsaker* and *Denise B. Moline*, on behalf of First State Broadcasting, Inc., *Harvey J. Shulman*, and *Michael R. Bennet*, on behalf of Kent County Radio Limited Partnership; *Dennis J. Kelly*, on behalf of Smyrna Broadcasters Limited Partnership; *Gene A. Bechtel* and *Mark R. Burtschi*, on behalf of Central Delaware Broadcasting Co.; and *Jerry M. Hermele*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: August 4, 1989; Released: August 24, 1989

By The Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. The Review Board has before it: (1) the *Initial Decision*, 3 FCC Rcd 6823 (1988)(I.D.) of Administrative Law Judge Joseph Chachkin (ALJ) granting the application of Kent County Radio Limited Partnership (Kent) for authority to construct and operate a new FM commercial broadcast station at Smyrna, Delaware; (2) the Exceptions and Contingent Exceptions, and Replies thereto, filed by the other four competing applicants, and Kent, respectively; and (3) a Petition to Reopen the Record and Petition to Enlarge Issues by Central Delaware Broadcasting Co. (Central) filed immediately prior to the release date of the I.D. (but after adoption of the I.D. by the ALJ), requesting reevaluation of Kent's comparative representations and the enlargement of issues against Kent to include misrepresentation/lack of candor and Section 1.65 qualifying issues. Oral argument was held on June 16, 1989. Having heard oral argument and reviewed the Exceptions, Replies, and the Petitions to Reopen the Record and to Enlarge Issues, as well as the documents and the transcript in the hearing below, we deny the Petitions to Reopen the Record and to Enlarge Issues, affirm the ALJ, except as modified herein, and grant the application of Kent.

2. Only five applicants now remain in this proceeding: Kent; Central; The Baltimore Radio Show, Inc. (BRS); First State Broadcasting, Inc. (First State); and Smyrna Broadcasters Limited Partnership (SBLP). By *Hearing Designation Order*, 2 FCC Rcd 1766 (1987)(HDO), fourteen applicants were originally designated for hearing. *See* I.D., 3 FCC Rcd at 6828 n. 1. In addition to the standard comparative issue (which encompassed a comparison of areas and populations to be served), "air hazard" and "environmental impact" issues were specified with respect to all applicants. By various subsequent orders of the ALJ, the "air hazard" and "environmental impact" issues were resolved favorably with respect to all remaining parties. *See id.*, at 6828-6829 nn. 2-3. And, the parties stipulated that no decisionally significant differences exist as between their respective coverage proposals. *Id.*, at n. 4.

3. Briefly, the ALJ granted Kent's application because it was deemed comparatively superior over all of the remaining applicants. The ALJ effectively eliminated BRS, First State, and SBLP from serious competition by imposing on all three diversification demerits and by denying each ownership/management integration credit. (Only First State sought such integration credit; however, it only proposed 50% integration into ownership/management.) Kent and Central were both accorded 100% quantitative integration credit, and neither was found to have other outside media interests. The ALJ concluded that Kent was superior to Central, however, based on the enhancement to Kent's integration proposal for past civic participation (and such enhancement credit was not sought by, or awarded to, Central). On all other qualitative comparative factors, Kent and Central were found equal. The exceptions are mainly directed against Kent, challenging its 100% quantitative integration credit and its enhancement for civic activities, as well as arguing that a remand of the proceeding is necessary on character and financial issues before Kent's application may be granted. Other exceptions contest Central's quantitative integration credit and financial qualifications, as well as whether First State is entitled to parttime integration credit and whether BRS should have received a diversification demerit. Because we agree with the ALJ's ultimate conclusions on Kent's quantitative integration credit and qualitative enhancement, and are persuaded that there are no substantial and material questions of fact presented by the other exceptions to Kent's application, we need not reach the exceptions directed against the remaining applicants, because even if those exceptions were granted, these applicants could not prevail over Kent.

4. *Quantitative Integration*. Kent is a limited partnership formed pursuant to a post-designation, pre-hearing merger of three of the original applicants to this proceeding: Cynthia Richardson, filing as an individual; A.P. Communications, Limited Partnership; and Smyrna Radio Limited Partnership. I.D., para. 12. *See Memorandum Opinion and Order*, FCC 87M-1889, released August 11, 1987 (granting joint request for approval of merger agreement). Both limited partnership applications were dismissed pursuant to the merger, and the Richardson application was amended to substitute Kent as the new entity applicant. *Id.*, para. 13. Richardson became the sole general partner of the merged entity, holding 100% voting and 51% equity interests, respectively, and A.P. Communications Limited Partnership and Smyrna Radio Limited Partnership became limited partners of Kent, each holding a 24.5% equity interest. *Id.*, para. 12. Richardson has since increased her equity interest to 55.9% and the limited partners have decreased their interests accordingly. *See* Motion for Leave to Amend, filed July 12, 1989 by Kent. Richardson proposes to serve fulltime as General Manager of the station; and, as noted previously, Kent was awarded 100% quantitative fulltime integration credit by the ALJ based on Richardson's 100% voting interest.

5. In their respective exceptions, each of the four competing applicants contend that Kent should be wholly or partially stripped of its quantitative credit.[1] Initially, they assert that there is no reasonable basis to believe that the limited partners will defer to Richardson's exclusive management of the station. Second, they directly challenge the structure of the limited partnership agreement, arguing that it contains various provisions that eliminate any possibility of according "passive" status to the limited partners. Finally, they dispute whether Richardson will hold a meaningful policy function, or be able to effectuate her proposal in light of family plans. For the sake of clarity, we address each argument *seriatim*.

6. First, the parties claim that Richardson lacks any broadcast or managerial business experience, whereas the limited partners are existing broadcasters with nearby stations, and argue that in light of these factors, it defies common sense to believe that the limited partners will abdicate control over the station to someone without any broadcast experience. In this regard, they also complain that they were unfairly denied an opportunity to ventilate this relationship at hearing, because the ALJ prohibited both discovery and cross-examination of Kent's limited partners. SBLP also charges that the ALJ erred in denying its motion to add a separate real-party-in-interest issue against Kent.

7. These allegations provide no legal basis for depriving Kent of its quantitative integration credit. In essence, the claim that the limited partners, rather than Richardson, will manage and control the operation of the station is predicated on conjecture and unsupported on the record. "[T]he Commission regards 'limited' partners - *absent contradictory factors* - as merely passive investors who have no *de jure* or *de facto* ability to control a partnership entity." *Magdalene Gunden Partnership*, 3 FCC Rcd 488 (Rev. Bd. 1988) (emphasis added), *review denied*, 3 FCC Rcd 7186 (1988). Here, there have been no alleged "contradictory factors," other than their sizeable financial contribution, that demonstrate that the limited partners have had, or will have, any influence over the management or operation of the partnership or station. The Commission rejects the contention that an integrated principal's lack of broadcast experience is relevant to quantitative integration. *See Cannons Point Broadcasting Co.*, 93 FCC 2d 643, 649-650 (Rev. Bd. 1983)(subsequent history omitted); *see also Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1224 (Rev.Bd. 1984), *review denied*, 3 FCC Rcd 2527 (1988). The instant limited partnership agreement vests exclusive authority in Richardson to prosecute the application, construct the station, and to operate it without interference from the limited partners (*see* §3.01(a), (b), and (c) of Kent Exh. 3, pp. 13-15), and the ALJ's findings accept Richardson's ability to effectuate her proposal. I.D., para. 42. Central concedes that if Richardson were still a single-party applicant, her proposed integration as general manager would be accepted without question. Central Br. at 9. Beyond speculation, no party here has demonstrated her deficiency in this setting.

8. Furthermore, we perceive no reversible error on the part of the ALJ in prohibiting discovery or cross-examination of Kent's limited partners. A presiding ALJ has broad discretion over the use of discovery, and the rulings of the ALJ will not be disturbed unless such rulings are arbitrary or an abuse of discretion. *See Florida-Georgia Television Co., Inc.*, 15 RR 2d 1028 (1969). We have previously recognized that such discretion is particularly important where discovery, as here, is being sought pursuant to the standard comparative issue. *See Regal Broadcasting Corp.*, 16 FCC 2d 610 (Rev. Bd. 1969). Of course, to ensure adequate review, an ALJ's disposition should contain a statement of the reasons for the ruling. *See Southern Broadcasting Co.*, 35 FCC 2d 338, 341 (Rev. Bd. 1972). Here, the ALJ's ruling prohibiting discovery (*Memorandum Opinion and Order*, FCC 87M-1953, released August 18, 1987) did, in fact, distinguish this case from other situations where depositions of limited partners have been permitted. The ALJ pointed out that examination of limited partners is generally permitted to explore whether their role in the formation of an applicant and the prosecution of its application has been consistent with their status as passive investors; but, the ALJ properly ruled that that rationale was inapplicable, because the newly merged applicant was formed after those stages were completed. Next, he noted that unlike many cases where discovery was permitted, the general partner here, Richardson, holds a controlling interest, thereby diminishing the likelihood of a sham. He also noted that the partnership agreement expressly prohibits the limited partners from active participation in the limited partnership. In the light of those facts, and in the absence of a persuasive showing of the need to depose the limited partners, he concluded that discovery should not be permitted. For similar reasons above, the ALJ ruled that cross-examination of Kent's limited partners would not be permitted. *See Order*, FCC 87M-2365, released September 29, 1987. The parties have not shown that those rulings were unreasonable under the facts of this particular case, and we cannot conclude on our examination of the present record that the ALJ abused his discretion.[2]

9. Finally, we conclude that the ALJ properly denied the real-party-in-interest issue sought by SBLP against Kent. SBLP's motion was based on a newspaper article quoting former counsel for one of the pre-merger limited partners as stating:

> Control follows money- that's the big problem. Anyone who believes that the person putting up the money is going to let a totally inexperienced minority run a station is living on another planet.

Br. at 14, quoting Barnes, *Investors Use Blacks As Fronts To Obtain Broadcasting Licenses, Wall St. J.* Dec. 11, 1987, at 1, col. 1. The ALJ correctly noted that the motion was procedurally deficient insofar as it was based on hearsay, *see CBS, Inc.*,49 FCC 2d 1214, 1223 (Rev. Bd. 1974). But, more importantly, he concluded that the motion was also entirely without substance. Specifically, the language above did not relate to the specific Kent application or to a situation like the one here, where Kent's general partner initially applied for a station in her own name. Instead, counsel's opinion was contained in a newspaper article, not relevant here, discussing how investors frequently use minorities as fronts to obtain a broadcast license, a condition with which we are quite familiar. *See generally Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1987 (Rev. Bd. 1987) and cases cited therein.

10. With respect to the second line of argument, exceptors claim that the Kent limited partnership agreement contains numerous unorthodox provisions that strip away the insulatory barriers necessary for non-attribution of the limited partner's ownership interests. Specifically, they contend that the agreement fails to bar the limited partners, their principals, or members of their immediate families from communicating with the general partner, or station manager which Richardson is required to hire, on matters pertaining to the day-to-day operation of the station or partnership. They further claim that the agreement places a series of business and financial restrictions on the general partner, pointing out that the general partner cannot undertake to make major modifications of the station license or to sell, lease, or otherwise dispose of the partnership property without the approval of the limited partners. Additionally, they note that Richardson cannot convert her personal interests as general partner to a corporate interest without consent, nor can she engage in lending partnership funds or borrowing partnership funds. They argue that she is also limited as to the terms she can arrange for financing the purchase of equipment and that she must set aside a fixed percentage as a reserve for operating losses and capital expenses and must pay out the excess funds to the partners each quarter. Finally, the parties charge that except for death, bankruptcy or adjudicated incompetence, the general partner cannot without consent withdraw or resign from that position, and if consent is given, the agreement does not limit the limited partners from becoming a successor in interest to Richardson as the general partner.

11. With respect to the allegations that the limited partners or their proxies are not barred from communicating with Richardson or the proposed station manager, we note (in rejecting these allegations), that §3.06 of Kent's limited partnership agreement explicitly prohibits the limited partners from taking part in the control of the business or affairs of the limited partnership, or even having any voice in the management or operation of the station. The Commission has previously held in *Wisconsin Television, Ltd.*, 102 FCC 2d 1001, 1003 (1985) that a limited partner's interests are not attributable for purposes of invoking the cross-interest prohibition of §73.3555(c)(3)[3] *where the limited partnership agreement expressly proscribes the limited partners from having any voice in the affairs of the partnership or in the management and operation of the station.* That principle would appear to be equally applicable here, as was conceded by counsel for Central at oral argument. Tr. of Oral Arg. 537. Moreover, Richardson testified that she interpreted the §3.06 blanket prohibition as basically "covering everything. Tr. 145.

12. The allegations as to the business and financial restrictions on the general partner are also unavailing. The Commission has declared that there are a number of powers which limited partners may properly exercise and still remain exempt from attribution, including voting on a change in the nature of the business or on applications to the Commission to effectuate an assignment or transfer of control of the company. *See Ownership Attribution*, 58 RR 2d 604, 620-621 n. 72. The provisions here prohibiting the general partner from disposing (without consent) of a substantial and material portion of the partnership property, or of undertaking to make a major modification of the station's license, do not exceed the relevant limit. Moreover, as pointed out by Kent (Reply Br. at 5-6), the prohibition against the general partner forming any entity to take over a portion of the limited partnership's business or property, or to pledge partnership property to a lender (other than a bank or other institutional lender), contemplates unusual and unexpected transactions outside the course of ordinary business.

13. As for the provisions limiting the general partner from borrowing from the limited partnership, or from lending limited partnership funds to a third party without consent, we credit Kent's explanation (Br. at 6) that such activities would constitute the "rare and questionable type of self-dealing and management that justify express protection to the limited partners," and are also outside the course of ordinary business. The provisions on the use of partnership capital contributions and the requirement for a contingency reserve fund and the distribution of cash throw-off also appear reasonable. Kent explains that the limit on capital contributions to an amount 20% in excess of a typical down payment for equipment is merely a financial protection to the limited partners against having to pay commercially unreasonable financing terms, and has no impact on the viability of Kent as a limited partnership. Br. at 12, n. 17. Similarly, the contingency reserve fund requirement simply requires that a small percent of funds be maintained in a separate account for emergency purposes, and the quarterly cash disbursement, (which Kent defines as cash on hand not needed for the reserve fund or anticipated expenditures) is designed to provide "protection to the partnership in the event of operational losses or the need for major renovations." Br. at 12, n. 17. The parties have not shown that these provisions unduly impact on Richardson's complete discretion as to the expenditures of partnership funds. Next, we are not persuaded that the provision prohibiting the withdrawal of the general partner, or the lack of an explicit provision barring a limited partner from becoming a general partner, provides the limited partners an opportunity to circumvent the Commission's insulative requirements. Kent explains that the general partner provision was inserted to provide the limited partners additional legal rights, should the general partner improperly withdraw from the limited partnership. Br. at 8, n. 12. And the contention that a limited partner could become a succes-

sor to Richardson as general manager is too remote to be meaningful, particularly in light of the §3.06 prohibition against the limited partners having a voice in the station.

14. Additionally, First State contends that Richardson's proposal cannot be credited because she will not hold a meaningful management and policy function at the station, and that her family plans contribute to the unlikelihood of the effectuation of her integration proposal. It argues that the station manager is charged with direct supervision over all station employees, and that Richard's duties would be largely consultative. Moreover, First State points out that Richardson is married with two children and that she testified at deposition that her husband would not move to Smyrna. First State claims that Richardson did not make any arrangements regarding the children, if they did not move to Smyrna. First State also notes that Richardson recently moved to London, England, and argues that this relocation throws substantial doubt on the sincerity of her commitment to move to Smyrna. Finally, the parties charge that the ALJ abused his discretion by assisting Kent in supplementing its direct case and concluding that Richardson would leave her current job to effectuate her integration commitment in the event her application was granted. They argue that Kent's direct case failed to contain any statement that she would leave her current employment, and that the ALJ, on his own volition, solicited such a statement from Richardson.

15. As the station's proposed general manager, Richardson proposes a policy-making function. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). She testified at hearing that, as general manager, she would have responsibility for the day-to-day operations of the station. Tr. 161. That she will also have a station manager does not legally undermine her proposal. We have previously observed that it is reasonable that integrated principals lacking broadcast experience will seek assistance in setting up and operating their broadcast station. *See Louisiana Super Communications Ltd. Partnership*, 102 FCC 2d 1293, 1303 (Rev. Bd. 1985). As long as the record does not demonstrate that the station manager would be substituted for the proposed integration of Richardson, which it does not, Commission precedent establishes no legal basis to disturb the ALJ's integration calculus. Moreover, Richardson testified under oath that she would move to Smyrna; and without palpable evidence otherwise, the record furnishes no support for ignoring her pledge, however subjectively unusual. *See Jerome Thomas Lamprecht, supra*, 99 FCC 2d at 1228. Finally, we reject any suggestion that the ALJ abused his discretion in eliciting Richardson's testimony that she would leave her current employment in the event of a grant of her application. Contrary to an argument raised by SBLP, *Johnston Broadcasting Co. v. FCC*, 175 F. 2d 351 (D.C. Cir. 1949), does not require a presiding officer merely to sit back and rule on the receipt of evidence in comparative cases. Rather, that case stands for proposition that the Commission need not inquire, on its own behalf, into possible *comparative* differences between the applicants which are not suggested by any party, " *although in its discretion it may do so.* " *Id.* at 357 (emphasis added). Similarly, in *Ruth Payne Carmen*, 1 FCC Rcd 46 (Rev. Bd. 1986) and *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 (Rev. Bd. 1987), the Board pointed out that supplementation, if any, is in the ALJ's discretion. *See also Kennebec Valley Television, Inc.*, at 1241-1242 (inferences to be drawn where applicants have been remiss in failing to address explicitly current business pursuits). In sum, Kent is entitled to 100% quantitative fulltime integration credit.

16. *Civic Participation Enhancement.* As noted in para. 3, *supra*, the critical factor in the comparison between Kent and Central is the moderate enhancement credit bestowed on Kent for Richardson's extensive civic participation "within and on behalf of residents of the service area of the proposed station." I.D., para. 44. On all other factors, the two applicants were comparatively equal: 100% minority; 100% female; and both receiving slight credit for proposals to move to the service area. *Id.*, para. 46. Specifically, as detailed in paras. 19-24 of the I.D., the ALJ found that Richardson was: (1) an appointee to the Governor's Commission on the Status of Women during 1981-1982, where she was a major participant in a Black Woman's conference held in Wilmington, Delaware, and where she arranged for transportation for the people of the Smyrna-Dover area to attend the conference; (2) a member of Read Aloud Delaware (a nationwide program to promote literacy) since 1984, serving on the Kent County steering committee based in Dover; (3) a member of the Board of Directors of Opera Delaware, a cultural organization serving all of Delaware, since June of 1987; (4) a member for the past three years of the Brandywine Professional Association, a group dedicated to raise scholarship funds for academically successful minority students; (5) a member of the Junior League of Wilmington, serving members from all over the state, and through which Richardson was a member of a fund raising committee for the construction of a Ronald McDonald House (an institution designed to serve children all over Delaware); (6) a member of a steering committee of the Delaware Women's Conference (also through the Junior League) composed of women from all Delaware; (7) a fundraiser since 1981 and representative of Delaware State College at the American Association of Governing Boards for Universities and Colleges in 1985; and (8) a member since June of 1987 of the Peninsula Press Club (which fosters an exchange of ideas among members of the Kent County press), located in Dover.

17. Aside from the allegations in Central's Petitions to Reopen the Record and to Enlarge Issues, which relate to Richardson's hearing testimony on her civic activities (*see also infra* paras. 20-24), the parties' attack on the civic participation enhancement credit is predicated on two grounds: (1) most of the organizations in which Richardson relies for her enhancement credit are located outside the proposed service area and provide too weak a nexus to Smyrna to warrant any credit; and (2) Richardson's claimed civic activities within the proposed service area were initiated after the filing of her application, and should have been disregarded as upgrading.

18. A brief restatement of Commission policy on past civic participation is appropriate. At the outset, the Commission's *Policy Statement, supra*, sets forth the rationale for awarding enhancement credit to integrated owners with past participation in local activities; *i.e.*, such involvement instills useful knowledge of the community's needs and betokens an interest in the welfare of the community. 1 FCC 2d at 395-396; *see also Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109 (Rev. Bd. 1984). Credit, albeit of a lesser weight, is also awarded for activities occurring within the service area of the proposed station but outside the community of license. *See Waters*

Broadcasting Corp., 91 FCC 2d 1260, 1262-1263 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). No enhancement credit is awarded for activities occurring outside the proposed service area. *See Radio Jonesboro, Inc.*, 96 FCC 2d at 1109. Local or service area residence, however, is not a prerequisite for civic credit. *Id.* Moreover, we have previously held that civic activities occurring after the filing of the application are entitled to credit, albeit "not as much as a [pre-filing] record of such activities would warrant." *Talleyrand Broadcasting*, 103 FCC 2d 476, 480 n. 5 (Rev. Bd. 1985). Finally, we note that Kent cites to a pre- *Policy Statement* case as support for the proposition that credit may be awarded for county-wide governmental activities that include the service area. *See Coastal Broadcasters, Inc.*, 37 FCC 1002, 1016 (Rev. Bd. 1964).

19. Applying these principles to the facts of this case, Kent is entitled to enhancement credit for Richardson's involvement in those organizations actually located within the service area; *i.e.*, her activities with the Delaware State College and the Peninsula Press Club. Both entities are located in Dover, Delaware (within the proposed service area). Because her membership in the Peninsula Press Club commenced after her application was filed, however, Kent is entitled, at most, to only a minor enhancement credit for those activities. Additionally, Kent is entitled to credit for Richardson's activities occurring within the proposed service area, notwithstanding that the organization sponsoring the activities was not located there; *i.e.*, Richardson's participation as a panelist at the Governor's Commission on the Status of Women held in Dover, and her membership on the Kent County Steering Committee of the organization Read Aloud Delaware. Credit for the latter activity is again diminished because it occurred after Richardson filed her application. With respect to the other organizations, we agree with Central, and are hesitant to award civic credit to Kent merely because a particular organization is state-wide or includes members from the community or proposed area. The only support cited by Kent for award of such credit related to county-wide governmental activities (which, because of their local nature, would be more likely to impart a knowledge and interest in the community of license or service area), but absent some showing as to how such local knowledge will be similarly imparted by state-wide activities, we are unwilling to extend civic participation credit for activities that have only a remote bearing on the proposed service area. Accordingly, although we are diminishing Kent's civic activities credit from "moderate" to "slight," that credit remains dispositive here.

20. *Petition to Reopen the Record.* As noted in para. 17, *supra*, Central objects that Richardson's claimed civic activities misrepresented the nature of those activities and that she has since abandoned them. In support, Central submits the affidavits of Barbara Corrozi, the Executive Director (since 1985) of the Governor's Commission on the Status of Women; Aida Waserstein, a Delaware attorney; and Louella Johnson, assistant to the Conference Co-ordinator for the American Association of Governing Boards for Universities and Colleges. Central claims that Richardson's testimony as to the length of time she served on the Governor's Commission, *i.e.*,"about a year and one half" in 1980 and 1981, and her testimony that she attended Commission meetings and participated in a Black Women's Conference held in Wilmington, Delaware during her membership on the Committee, are squarely at odds with Corrozi's affidavit. Carrozi claims that Richardson was appointed to the Commission sometime between June and September 1980 and continued until May, 1981, a period of no more than eleven months (and as little as eight). Copies of the Commission minutes appended to Corrozi's affidavit fail to reflect Richardson's attendance, or to make any reference to a Black Women's Conference. Waserstein's affidavit, in turn, relates conversations with individuals from the organizations enumerated above, *see* para. 16, *supra*, which conversations, Central argues, undermine Richardson's claimed participation in these organizations. According to Waserstein, these include statements by Jean Bochnowski, a member of the Peninsula Press Club, (that she did not know Richardson and that Richardson was not an active participant in club activities); Carol Perrington of the Kent County office of Read Aloud Delaware, (that Richardson attended one Kent County steering committee meeting over a year ago, but has not attended any since and is not expected to become involved unless she gets the Smyrna radio station); Paul Wyche, the present Chairman of the Brandywine Professional Association, (that Richardson dropped her involvement with that organization in March 1988); Jean Fogarty, the staff person working for We Care Delaware, Inc. on the Ronald McDonald House (that she did not know who Richardson was); and Lee Kimball, Executive Director of Opera Delaware, Inc. (that Richardson had not been active in that organization since the summer of 1988). Central's affidavit of Louella Johnson states that the records of the American Association of Governing Boards for Universities and Colleges indicate that it was Richardson's husband, rather than Richardson, who was the Delaware State College representative at the 1985 conference. Johnson further states it is not uncommon for a spouse of a delegate present at the Conference to be given a name badge, but such persons are not considered delegates unless they are registered as such.

21. In rebuttal to the allegations concerning the Governor's Commission on the Status of Women, Kent concedes that Richardson was mistaken in her recollection of the duration of her membership and the dates of certain events, but it argues that the minor inaccuracies do not detract from the substance of her many volunteer activities on matters involving that Commission. Thus, with respect to her tenure, Kent points out that at the time she was asked about the dates, she replied: "I'm very bad on dates and times," (Tr. 212) adding that she had no documents to refresh her memory about the Governor's Commission when asked how long she had served. In her affidavit, Richardson avers that she attempted to give a truthful answer under the circumstances. Her precise testimony, given more than 6 1/2 years after she left the Governor's Commission, was: "It was in § 81 when I served on the Commission . . . I believe that it was about a year and a half. No more than that anyway." Tr. 216. With respect to her other testimony relating to her role on the Governor's Commission, she stated:

> Three meetings that I attended, three or four meetings that I attended of the Commission. I don't really recall because there were some meetings that we had as subgroups in the Wilmington area . . . . I did go to one meeting in Dover at the Commission, and I attended other meetings in other parts of the state . . . . We did a Black Women's Conference that we -- that I was a major participant in.

Tr. 216, 217, 219. Kent furnishes copies of full Commission meeting minutes from March, May, and June 1975, which refer to the Black Women's Conference co-sponsored by the Commission in May 1979 (*i.e.*, before Richardson was a Commission member), as well as a workshop held in Dover in April 1980, where Richardson was a speaker on one of the panels. Moreover, Kent submits the affidavit of Barbara Herr, Chairperson of the Governor's Commission on the Status of Women from 1977-1982. Herr avers that during her tenure as Chairperson, Richardson was actively involved in a number of Commission activities, including serving as Chairperson of a Black Women's Conference Steering Committee which helped plan, organize, and implement the Black Women's Conference held in Wilmington in the Spring of 1979, attended by approximately 1200 women. Herr says that it was because of the work Richardson accomplished at the conference that she suggested to the Governor that Richardson be named to the Commission. Herr asserts that Richardson also participated in a workshop sponsored by the Commission at the State Capital Building in Dover in 1980, where Richardson was a speaker on one of the panels.

22. With respect to the allegations by Waserstein, Kent submits its own series of statements in rebuttal. Thus, Kent proffers the statement of Deborah Schiffer, President of the Peninsula Press Club from October 1987 to July 1988, in which Schiffer avers that she knows Richardson, that Richardson is a dues paying member, and that Richardson was involved directly in club activities on at least two occasions. Kent concedes that Richardson's involvement with the Peninsula Press Club was not extensive, but argues that it is nonetheless real. As for her involvement in Read Aloud Delaware, Kent supplies the affidavits of Carol Billman and Carol Perrington. Billman, the first director of Read Aloud Delaware (from September 1984 to September 1985), states that on several occasions in 1984 and 1985, Richardson did unpaid volunteer work for Read Aloud Delaware, including assisting with mailing, distributing leaflets, and donating books. Additionally, Perrington states that she invited Richardson to join the Kent County Steering Committee and that Richardson attended its final meeting. Perrington adds that she spoke to Richardson many times on the phone while Richardson was a Steering Committee member, and asked if she would draft some public relations material promoting an event in the Dover area sponsored by Read Aloud. She says that Richardson successfully performed this task and that they used her draft. With respect to the Brandywine Professional Association, Kent submits the statements of Paul Wyche and Margaret Henry. Wyche, the Chairman of that organization and an active member since its beginning, states that he told Waserstein that Richardson's leadership role ended in approximately March 1988, not that her involvement or activities with the organization ended at that time, and that he was angered by Waserstein's characterization of their conversation concerning Richardson whom he regards as one of the organization's most valued members. He added that Richardson played a major leadership role in the organization for three years. Henry, who has served as vice president of the Brandywine Professional Association since 1986, also stated that Richardson actively worked on their annual awards dinner and provided much technical assistance to the planning of next year's event. She declared that Richardson is a tireless promoter of the Association and was active in their recruitment efforts until her departure for London.

23. Kent also submits the affidavits of Jean Fogarty and Esther Pappas to support its contention that Richardson was involved on the Ronald McDonald House project. Fogarty acknowledged that there were a number of women (whose names she did not know) from the Junior League of Wilmington who solicited funds for the Ronald McDonald House, and she declares that she had no idea that her statement to Waserstein that she did not know Richardson would be used before the FCC to argue that Richardson had not been involved in fundraising for the Ronald McDonald House. Had she been asked that question, she adds, she would have explained how the Junior League runs a fundraising program for the Ronald McDonald House and that she does not know most of the Junior League fundraisers. Pappas, Chairman of the Volunteers Committee of the Junior League of Wilmington, corroborates that Richardson, indeed, attended several meetings and participated in fundraising activities for the Ronald McDonald House in Wilmington. Finally, Kent points out that Margaret Henry's affidavit also states that Richardson was the Chairman of the Arts Committee for the Wilmington Chapter of Links, Inc., a social, cultural, and educational institution helping Delaware's minority community, and that she worked "extremely hard" to put on a reception following each performance of the opera she had produced for Opera Delaware.

24. Finally, in opposition to the statement of Louella Johnson concerning Richardson's claimed activities as a conference attendee as representative of Delaware State College at the American Association of Governing Boards for Universities and Colleges in 1985, Kent submits the following statement of William Dix:

> I am the Chairman of the Board of Trustees of Delaware State College. I have personal knowledge of the following facts.
>
> Cynthia Richardson attended two conferences of the American Association of Governing Boards for Universities and Colleges ("AGB") as an unofficial representative of Delaware State College in 1985 and 1986.
>
> Although Cynthia was not an official "representative" to the conference as defined by the AGB (i.e., a salaried employee of the College or a Member of the Board of Governors), in my mind this is a distinction without a difference. Cynthia was reimbursed through Delaware State for her registration fee and the college treated her as other representatives of the college. There was no difference between the role played by Cynthia at the conference and the role of any other representative of the college, with the exception of certain sessions which were limited to Board Members such as the session on Orientation of new Board members.
>
> Due to circumstances beyond my control, I was forced to miss most of the 1986 conference. However, with respect to the 1985 conference, Cynthia attended numerous conference sessions and participated in additional meetings with conference participants as part of the Delaware State delegation. Cynthia's participation at the conference was as active as anyone in the delegation.

> I am also aware that Cynthia has been actively involved in fundraising for the athletic department, through the Football Classic, and for the Luna I. Mishoe Scholarship fund for several years.

25. We conclude that on the basis of Kent's opposition and supporting documentation, there are no substantial and material questions of fact that require a remand or further inquiry into Richardson's testimony regarding her participation in various activities. Both the statements of Corrozi and Johnson were based on their review of bare organizational records, which did not reflect the extent of Richardson's activities that were corroborated by other officials in the various organizations. In addition, Corrozi's efforts to verify Richardson's activities on the Governor's Commission were hampered by Richardson's faulty recollection of the dates. However, that is not sufficient to serve as a basis for a misrepresentation/lack of candor issue. *See Signal Ministries, Inc.*, 104 FCC 2d 1481, 1487-1488 (Rev. Bd. 1986) (no misrepresentation where errors in testimony can reasonably be accounted for by the fading memory of witness due to passage of time), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988). With respect to the allegations based on Waserstein's affidavit, we note that her affidavit does not comport with our rules governing Motions to Enlarge Issues, *i.e.*, Section 1.229(d) (allegations shall be supported by affidavits of persons having personal knowledge thereof), or Petitions to Reopen the Record, *see News-Sun Broadcasting Co.*, 27 FCC 2d 61, 62 (1971); and, in any event, the matters raised have been adequately rebutted by the supporting documentation appended to Kent's opposition. We will therefore deny Central's Petition to Reopen the Record and Petition to Enlarge Issues.[4]

26. *Miscellaneous*. SBLP also contends that Kent's grant cannot be affirmed without a further hearing on general financial and financial certification issues. Earlier, by *Memorandum Opinion and Order*, FCC 87M-2662, released October 26, 1987, the ALJ denied a Motion to Enlarge Issues filed by SBLP which sought financial and related misrepresentation issues against Kent. The enlargement motion was predicated on claims that Richardson did not have a written cost estimate of her construction and operation costs, and that she failed to provide a financial statement to the bank that issued her a loan commitment letter. In denying the motion, the ALJ held that SBLP's request was "without factual support, founded on speculation and conjecture, and based on a misreading of legal precedent." He reasoned:

> Richardson's deposition and her declaration submitted with Kent County's opposition establish that budget figures were formulated in a verbal discussion with her counsel. The fact that she did not receive the budget figures in written form has no bearing on their efficacy. Secondly, the declaration of the bank official establishes that at the time of obtaining the loan letter, the bank was very familiar with Ms. Richardson and her husband, who had banked with that institution over a number of years; that within a few weeks before meeting with Ms. Richardson to discuss the bank loan, the bank had received and reviewed in connection with a non FCC transaction, extensive and detailed financial information from Ms. Richardson and her husband; and that Ms. Richardson had explained to the bank her budgetary needs for the Kent County, station.

Id. (Footnote omitted). SBLP charges initially in its exceptions that the ruling regarding written documentation as to cost estimates is clearly erroneous as a matter of law, citing *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986) and *Christian Childrens Network, Inc.*, 1 FCC Rcd 982, 982-983 (Rev. Bd. 1986) (subsequent history omitted). SBLP argues that the two cases, read together, require written documentation as to cost estimates. SBLP reiterates its previous contention that an issue is also warranted because Richardson never presented her financial statement to the bank in securing the loan commitment letter. Finally, SBLP introduces a new argument, claiming that Richardson's testimony reveals that she did not discuss collateral requirements with the bank, citing Tr. 206.

27. We conclude that the ALJ properly denied SBLP's motion to enlarge issues, and that SBLP has not raised in its exceptions a substantial and material question of fact concerning Kent's finances that requires a further evidentiary hearing. Following the filing of exceptions here, the Commission released (on July 13, 1989) *Northampton Media Associates* (FCC 89-215), holding that reasonable assurance of financial qualifications does not necessarily require an applicant to have written documentation when it certifies its financial qualifications. The Commission stated:

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue," as the 1981 version of Form 301 requires.

FCC 89-215, at para. 15. Here, there has been no *prima facie* showing that Richardson failed to engage in serious and reasonable efforts to ascertain her construction and operating costs. Indeed, her affidavit stated:

> Before I met with Mr. Wright [James W. Wright, President of Beneficial National Bank,, Wilmington, Delaware], my FCC counsel provided me, orally over the telephone, with a proposed budget to construct and operate (for three months without revenue) the station. I was told that this information was based largely upon a recent FCC guidebook on applying for the new FM station allocations, and that my counsel had checked various items with experienced broadcasters and/or engineers. I discussed with my counsel various items in the list and associated costs to see if they were high, low or right for a station in Smyrna of the type I was contemplating. Other items like operating expenses (for salaries, rents, etc.) were also discussed and added

> in. The end result is that I had what I feel was a good estimate, based upon reliable information, of what it would take to construct and operate the Smyrna station.

Attachment A, Kent Opposition to Motion to Enlarge, October 8, 1987. Hence, SBLP's initial allegation concerning the lack of written cost estimates is not a basis for a remand. We note in passing, however, that the cases cited by SBLP would not have, in any event, served as precedent for requiring the requested additional issues. The prior general requirement of "written documentation" enunciated in *Las Americas*, 1 FCC Rcd at 788, pertained only to the showing necessary to establish the reasonable assurance of the availability of funds and did not address the question whether there was also a written requirement concerning cost estimates. *See also Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd.), *review denied*, 3 FCC Rcd 4767 (1988).[5]

28. As to SBLP's assertion that Richardson did not present her financial statement to her bank, James Wright, President & Chief Operating Officer of the Beneficial National Bank that issued the loan commitment letter averred:

> I held my present position in December 1985 when I met with Cynthia Richardson to discuss her loan application to finance the construction and operation of an FM radio station in Smyrna, Delaware for which Ms. Richardson was applying.
>
> At that time the Bank was very familiar with Ms. Richardson, as well as her husband, both of whom had been banking with us for a number of years.
>
> Ms. Richardson explained to me her budgetary needs for the construction and operation (for three months without revenue) of the proposed station. According to Ms. Richardson, the items in her budget and amounts were provided to her by her FCC counsel. I was given the name and telephone number of that counsel if I wanted to check items, amount or had other questions. The Bank did not then require a formal, written budget, item by item, to act at that time on her application.
>
> Within a few weeks before my meeting with Ms. Richardson on the Smyrna radio station the Bank had received and I reviewed, in connection with another (not FCC-related) transaction involving Ms. Richardson, extensive and detailed financial information, in writing, from both Ms. Richardson and her husband on any joint and individual assets. I told Ms. Richardson that this recent information would be adequate as there had been no significant changes. Therefore, it was not necessary for Ms. Richardson to re-file personal financial data specifically in connection with the Smyrna station.
>
> Based upon the budgetary requirements for the proposed station, the knowledge of Ms. Richardson's financial situation, her banking history with the Bank, and other relevant factors typically considered, the Bank, in accordance with its procedures, provided Ms. Richardson an appropriate bank letter dated December 30, 1985 to be used to support her proposed FCC applications.
>
> In early July 1987 I was contacted and informed that Ms. Richardson had reached an agreement with two other applicants for the Smyrna station in which she would be the sole general partner (and the two others would be limited partners) in a new limited partnership that would be the applicant substituted for Ms. Richardson. I was told that Ms. Richardson's counsel was preparing to file this agreement at the FCC and wanted a reaffirmation Bank Letter. I stated that the Bank Letter would still stand for Ms. Richardson and her partnership, as it is actually to her benefit to have some additional investors. The Bank Letter still stands today for Ms. Richardson and for Kent County Radio Limited Partnership and we contemplate no changes in that regard. It is understood that this statement in no way modifies the previous Bank Letter terms as they are applicable to Ms. Richardson and her partnership.

Attachment B, Kent Opposition to Motion to Enlarge, *supra*. Finally, the record support for the most recent claim that Richardson did not discuss collateral requirements with the bank is equivocal and insufficient to support a remand. Kent, for example, claims that the allegation is an incorrect, out-of-context reading of her testimony (which ran for several pages from Tr. 202-207). It states that the line of questioning related to collateral requirements or guarantees from the limited partners, and that the bank was looking to Richardson's assets, not those of her limited partners, for collateral and guarantees. We agree from our review of the record that the testimony is ambiguous, and find it too tenuous for remanding the proceeding, particularly in light of Wright's declaration.[6]

29. *Conclusion*. Kent has been awarded 100% quantitative fulltime integration credit, slightly enhanced by Richardson's past civic activities and future local residence. As a minority female, Richardson enjoys a favored status and a preference. *See generally Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984), *review denied*, FCC 85-558, released October 18, 1985, *held in abeyance*, 2 FCC Rcd 1474 (1987), *reaffirmed*, 3 FCC Rcd 866 (1988), *review denied sub nom. Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C. Cir. April 21, 1989). Kent has no other outside media interests. The critical exceptions challenging Kent all, more or less, are based on the exceptors' view that the notion that limited partners who supply substantial capital, and claim they will wholly defer to any inexperienced general partner in the operation of a valuable broadcast property, requires a suspension of ordinary powers of disbelief. That view has been expressed many times. *See Tillotson, FCC's Comparative Process Is A Sham And A Shamble, BROADCASTING*, Oct. 5, 1987, at 22; Barnes, *Wall St. J., supra*. Nonetheless, Commission policy and precedent require that we accept these arrangements, *see, e.g., Victory Media, Inc.*, 3 FCC Rcd 2073 (1988); *Susan Mulkey*, FCC 89-217, released July 13, 1989, unless the record contains substantial evidence that allegedly passive investors have intruded, and/or will intrude, themselves into the applicant's business affairs. *See KIST Corp.*, 102 FCC 2d 288 (1985), *aff'd by judgment sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 4511 (1988), *dismissed*, No. 88-1646 (D.C. Cir. filed January 9,

1989). Thus, however cogent the exceptors' speculation that dominant investors are unlikely to defer absolutely to a neophyte broadcaster, that speculation is insufficient to overturn Commission policy and precedent.[7] As to the comparative aspects, Kent's closest competitor (Central) lacks any enhancement credit for past civic activities, and is otherwise only comparatively equal. The remaining applicants lag far behind on both the integration and diversification criteria. We have also carefully reviewed Central's Petition to Enlarge Issues and Petition to Reopen the Record, as well as SBLP's allegations that Kent's application should be remanded on financial and related issues, and found the allegations unpersuasive. Hence, we affirm the ALJ's grant of Kent's application.

30. ACCORDINGLY, IT IS ORDERED, That the Petition to Reopen the Record and Petition to Enlarge Issues filed on November 18, 1988 by Central Delaware Broadcasting Co. ARE DENIED, that the Petition for Leave to Amend filed December 6, 1988 by Baltimore Radio Show, Inc. IS GRANTED, and the amendment IS ACCEPTED; that the Motions for Leave to Amend filed December 16, 1988 and July 12, 1989, respectively by Kent County Radio Limited Partnership ARE GRANTED, and the amendments ARE ACCEPTED; that the Motion to Strike filed February 23, 1989 by Smyrna Broadcasters Limited Partnership IS DENIED; that the Request for Permission to Submit Appendices to Brief, filed March 6, 1989 by Central Delaware Broadcasting Co. IS GRANTED; and that the Motion for Leave to File Notice Re Two Recent Decisions filed July 24, 1989 by Central Delaware Broadcasting Co. IS GRANTED; and

31. IT IS FURTHER ORDERED, That the application of Kent County Radio Limited Partnership (File No. BPH-860102NZ) for a construction permit to establish a new FM broadcast station at Smyrna, Delaware IS GRANTED; and that the applications of the Baltimore Radio Show, Inc. (File No. BPH-860102NT), First State Broadcasting, Inc. (File No. BPH-860102NX), Symrna Broadcasters Limited Partnership (File No. BPH-860102OA), and Central Delaware Broadcasting Co. (File No. BPH-860102OB) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Both Central and First State would only reduce Kent's quantitative integration to 51%, Richardson's equity interest at the time of the hearing. SBLP, on the other hand, would reduce Kent's credit to 0%.

[2] SBLP is in error that the ALJ acted inconsistently by requiring First State to produce a non-integrated principal for deposition. A review of the ALJ's oral ruling reflects that the ALJ required the deposition of First State's non-integrated principal, Paul A. Teveen, because that individual, unlike Kent's limited partners, owned a majority of the non-voting stock and equity of the applicant. *See* Tr. 16; *Order*, FCC 87M-1277, released June 3, 1987. *See also* Tr. 15; *id.* (deposition required from former applicant Smyrna Radio Limited Partnership's majority equity owner, Darryl Nixon).

[3] Section 73.3555(c)(3) proscribes a party from directly or indirectly owning, operating or controlling a television station and a daily newspaper, where the station's predicted Grade A contour encompasses the entire community in which the newspaper is published.

[4] Central's petition also criticizes Kent for failing to report to the Commission pursuant to Section 1.65 of the Commission's Rules, 47 CFR §1.65, alleged curtailing of Richardson's civic activities. That Rule requires that substantial and significant changes in information supplied to the Commission be reported, but we are aware of no case, nor does Central cite any, where resigning from current civic activities is required to be reported. Credit for past civic activities in a service area remains even after, as here, the activities are terminated because the principal moved to London, England.

[5] At oral argument, counsel for SBLP also attacked the procedure Kent used in ascertaining its costs, claiming that the FCC Guidebook omits eleven significant items that were not considered by Kent. Tr. of Oral Arg. 522-526. It is clear, however, from a cursory review of the Guidebook cost estimates (*see* Exh. B of SBLP's reply filed October 15, 1987), that the eleven items are, in fact, listed, but that the particular costs estimates samples are omitted. There has been no showing here that such items were omitted by Kent in ascertaining its cost estimates.

[6] SBLP also contends that it is the only truly fully qualified applicant in this case, claiming that the ALJ erred in allowing all of the other remaining applicants to amend their applications to specify a short-spaced transmitter site. We will deny this exception since we have already effectively ruled on the ALJ's ruling. *See Baltimore Radio Show, Inc.*, 3 FCC Rcd 169 (Rev. Bd. 1988). Moreover, to preserve the point on appeal, SBLP challenges the constitutionality of granting minority and female preferences. We will not rule on this exception. *See generally William M. Piner*, 4 FCC Rcd 5100 (Rev. Bd. 1989).

[7] It is true, as the Board has recognized, that until recently a long line of cases held that the power of the purse is generally the power to control. *See Seven Hills Television Co.*, 2 FCC Rcd 6867, 6880 (Rev. Bd. 1987)(citing *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937); *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (D.C. Cir. 1958)). At the same time, the Board has noted a diminution of the Commissions' emphasis on financial dominance as a controlling factor. *Seven Hills, supra*, 2 FCC Rcd at 6880; *see also Victory Media, Inc., supra; Susan Mulkey, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1989

COMMISSION INSTRUCTS GENERAL COUNSEL TO JOIN IN PETITIONING COURT TO DISMISS APPEAL IN *LOS ANGELES TELEVISION, A CALIFORNIA LIMITED PARTNERSHIP V. FCC*

The Commission has voted to authorize its General Counsel to enter into a joint stipulation of dismissal of *Los Angeles Television, a California Limited Partnership v. FCC*, involving appeals of the Commission's approval of a settlement in the KHJ-TV, Los Angeles, California comparative renewal proceeding and related actions. The stipulation is to be filed with the U.S. Court of Appeals for the District of Columbia Circuit, where the appeal is pending. The Commission determined that the private parties' dismissal agreement, under which Los Angeles Television would receive payment for dismissal of its appeal, complies with the provisions of the Communications Act relating to settlements and is in the public interest.

The appeal had been taken from a Commission decision approving a settlement agreement terminating the comparative renewal proceeding involving KHJ-TV in Los Angeles, California. *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057 (1988), erratum issued, FCC 88-298 (Sept. 6, 1988), petition to set aside erratum denied, 3 FCC Rcd 6242 (1988). Pursuant to the terms of the settlement, the Commission dismissed RKO's application for renewal of its license for KHJ-TV, granted the competing application of Fidelity Television, Inc., and simultaneously approved the transfer of Fidelity to The Walt Disney Company.

The Commission found in approving the KHJ-TV settlement that the public interest would be served by resolving the extraordinarily protracted and burdensome RKO proceedings so that KHJ-TV could be operated by an unquestionably qualified licensee, able to devote its full resources to broadcasting without a cloud of uncertainty hanging over its head. The Commission also found that approving the settlement would preserve the policy of deterring licensee misconduct because: (1) RKO would not receive full compensation for its station, (2) RKO already lost WNAC-TV as a result of relevant misconduct, and (3) RKO must either withdraw from broadcasting or risk the loss of further stations if the Commission finds it unqualified in Phase I of the KHJ-TV proceeding. (The KHJ-TV settlement became the model for six additional settlements involving ten other RKO stations.)

In its 1988 decision, the Commission also rejected an attempt by Los Angeles Television, A California Limited Partnership (LATV) to file an application for KHJ-TV. LATV argued that the parties' attempt to settle warranted reopening the proceeding to new applicants. The Commission, however, found that LATV had not justified waiving the cutoff rule (47 C.F.R. § 73.3516(e)) to permit the filing of the untimely application. Subsequently, the Commission rejected a second attempt by LATV to tender an application. *RKO General, Inc. (KHJ-TV)*, 4 FCC Rcd 1304 (1989). LATV, this time, tendered an application during a filing period that was closed for KHJ-TV because of the continued pendency of the comparative renewal proceeding prior to consummation of the settlement. The Commission held that acceptance of the application – which would necessitate further comparative renewal proceedings -- would frustrate the strong public interest benefits of the settlement.

LATV appealed the Commission's approval of the settlement agreement and the rejection of LATV's attempts to file an application to the United States Court of Appeals for the District of Columbia Circuit.

In authorizing the General Counsel to join in the dismissal of LATV's appeal, the Commission determined that this action would facilitate the public interest benefits of the KHJ-TV settlement by removing any uncertainty resulting from the continuation of litigation concerning LATV's rejected attempts to file applications. (Appeals of the KHJ-TV settlement by parties to proceedings involving other RKO stations remain pending, however.) The Commission also determined that the private parties had submitted sworn statements, in conjunction with their dismissal agreement, stating that they filed or sought to file their applications in good faith and not for the purpose of reaching or carrying out a settlement agreement. Accordingly, the Commission found that the dismissal agreement complied with 47 U.S.C. § 311(d) and that it would serve the public interest.

FEDERAL COMMUNICATIONS COMMISSION*

* Action by the Commission August 4, 1989 by Public Notice (FCC 89-259). Chairman Patrick and Commissioner Quello, with Commissioner Dennis concurring and issuing a statement.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS CONCURRING IN THE RESULT

In Re: Dismissal Agreement in the Los Angeles, California Television Comparative Renewal Proceeding (Docket Nos. 16679-80).

I stand by the dissenting statements I issued in three previous decisions involving KHJ-TV: *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057(1988); *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 6242(1988); and *RKO General, Inc. (KHJ-TV)*, 4 FCC Rcd 1304 (1989). Therefore, I cannot join in the majority's reasoning in this case. I concur in the result on the narrow grounds that the dismissal agreement complies with 47 U.S.C. Section 311(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-360

In the Matter of

Amendment of Part 32 of
the Commission's Rules to
Implement Statement of
Financial Accounting
Standards No. 96, Accounting
for Income Taxes

NOTICE OF PROPOSED RULE MAKING

Adopted: August 4, 1989; Released: August 18, 1989

By the Commission:

I. INTRODUCTION

1. On May 9, 1988, BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (collectively, BellSouth), notified this Commission that they intended to implement Statement of Financial Accounting Standards No. 96 (SFAS-96), "Accounting for Income Taxes". BellSouth filed its notice pursuant to Section 32.16 of our rules, 47 C.F.R. §32.16.[1] Shortly after receiving BellSouth's notification, we received similar filings from Southwestern Bell Telephone Company (Southwestern Bell); New England Telephone and Telegraph Company and New York Telephone Company (collectively, NYNEX); Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, the Ohio Bell Telephone Company and Wisconsin Bell, Inc. (collectively, Ameritech); Pacific Bell and Nevada Bell (collectively, Pacific Telesis); and the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (collectively, U S WEST).

2. The Common Carrier Bureau (the Bureau) reviewed the carriers' filings, and, on August 1, 1988, issued an Order instructing carriers not to adopt the new accounting practices set out in SFAS-96.[2] The Bureau stated that adoption of these practices would require the addition of new accounts in the Uniform System of Accounts (USOA) we prescribe in Part 32 of our rules, 47 C.F.R Part 32, and might raise rate base issues that could affect Part 65 of our rules, 47 C.F.R Part 65. In this Notice of Proposed Rule Making we are proposing changes to Part 32 to incorporate the new accounting for income taxes prescribed in SFAS-96 and to establish new accounts that would properly implement those procedures. Our proposed handling of the new accounts in Part 32 does not require amendment of Part 65.

II. BACKGROUND

3. When this Commission adopted Part 32,[3] we incorporated provisions necessary to reflect generally accepted accounting principles (GAAP) consistent with our decision in CC Docket 84-469.[4] We also provided mechanisms for the adoption of future changes in GAAP.[5]

4. Before SFAS-96 was adopted, income tax accounting procedures were guided by Accounting Principles Board Opinion No. 11, Accounting for Income Taxes (APB Opinion No. 11).[6] APB Opinion No. 11 prescribed the deferral method of accounting for the tax effects of timing differences. Timing differences occur when items of revenue or expense are recognized in different accounting periods for tax return purposes than for book purposes. The tax effects of transactions that reduce taxes currently payable are recorded as deferred credits with a corresponding increase in the current period income tax expense, and the tax effects of transactions that increase taxes currently payable are recorded as deferred charges with a corresponding decrease in the current period income tax expense.[7] Under the deferral method, these deferred credits and deferred charges are determined initially on the basis of tax rates in effect at the time the differences originate, and are not adjusted for subsequent changes in tax rates.

5. Until the new USOA was adopted, our rules required APB Opinion No. 11 deferral accounting for depreciation-related timing differences, but generally prohibited the use of the deferral method for timing differences unrelated to depreciation. Section 32.22 of our rules, however, permits carriers to phase in on a prospective basis over five years (beginning January 1, 1988) the deferral method of accounting for all other timing differences. The Bureau waived this phase-in period for all subject carriers in a Memorandum Opinion and Order released on August 21, 1987.[8] The phase-in period was waived because the Tax Reform Act of 1986[9] and the implementation of Part 32 dramatically reduced the revenue requirement impact that would be associated with flash-cut normalization and earlier implementation would bring our tax accounting into alignment with GAAP at an earlier date. Today all carriers are using the APB Opinion No. 11 deferral method for all material tax timing differences, and have been following this method since Part 32 became effective on January 1, 1988.

6. In December 1987, the FASB promulgated SFAS-96, which superseded APB Opinion No. 11.[10] SFAS-96 prescribes the liability method of accounting for income taxes, as opposed to the deferral method prescribed in APB Opinion No. 11. Under the liability method, business entities estimate the future tax liability or future tax benefit that will occur as a result of differing tax and book treatment of "temporary differences". SFAS-96 defines a temporary difference as:

> A difference between the tax basis of an asset or liability and its reported amount in the financial statements that will result in taxable or deductible amounts in future years when the reported amount of the asset or liability is recovered or settled, respectively . . . . [While] some temporary differences cannot be identified with a particular asset or liability . . ., [SFAS-96 still considers them if they] (a) result from events that have been recognized in the financial statements and (b) will result in taxable or deductible amounts in future years based on provi-

> sions in the tax law . . . Events that do not have tax consequences do not give rise to temporary differences.

The term temporary difference, as it is used in SFAS-96, would include items previously described as timing differences, as well as other items the tax effects of which have never been accounted for under the deferral method. In the communications industry, the liability method can be expected to result in a net increase in credit amounts that will be reflected in balance sheets as a liability. The additional liability would also require the recognition of either an expense or a new "regulatory asset". The regulatory asset would represent the future revenues that would be required for the settlement of the newly recognized liabilities.[11] Among other changes to comply with the SFAS-96 objective of determining the future tax liability amount, a company must adjust individual components of net deferred credits (liabilities under SFAS-96) that were recorded under APB Opinion No. 11 at the higher tax rates in effect at the time taxes were originally deferred and actually paid-out at the lower tax rates brought about by the Tax Reform Act of 1986.[12] If Part 32 is not amended to reflect the changes brought about by SFAS-96, material differences can be expected to occur between carriers' published financial statements and the financial statements reported to this Commission that are used as the starting point for carrying out our various regulatory responsibilities -- a situation we sought to minimize when we adopted our current policy toward GAAP.

7. The issues we have identified for discussion with respect to the implementation of SFAS-96 are the rate base treatment of the SFAS-96 accounts; accounting for timing differences previously flowed through; accounting for excess deferred taxes; accounting for unamortized investment tax credit balances; accounting for the equity component of the allowance for funds used during construction; and accounting for operating loss and tax credit carryforwards.

III. DISCUSSION

8. In the *GAAP Order*, this Commission adopted a policy which envisioned adoption of GAAP changes absent an overriding regulatory consideration. Based on the information provided by the carriers who filed notices of an intention to follow SFAS-96, as well as additional information provided by other carriers in response to specific requests,[13] we have tentatively concluded that SFAS-96 can be adopted for the regulated telecommunications industry in such a way as to make tax accounts maintained for regulatory purposes comparable to those shown in published financial statements without any impact on revenue requirements, with one possible exception. This exception would be with respect to excess deferred taxes which are not protected by Section 203(e) of the Tax Reform Act of 1986.[14] For the unprotected excess deferred taxes, we expect the proposed rule to reduce tax expenses in the year of implementation since SFAS-96 requires excess deferred taxes to be reflected in income at the time of adoption. The adoption of SFAS-96 requires that we amend Part 32 in several areas. The major issues raised by the proposed adoption of SFAS-96 are separately discussed below.

A. Rate Base Considerations.

9. Implementation of SFAS-96 will affect carrier balance sheets by causing the recognition of a new asset, and, on the liability and stockholder equity side, by requiring adjustments to accumulated deferred income taxes. A portion of the adjusted amount attributable to excess deferred taxes would be reclassified as a liability to ratepayers and the remaining amount would be recorded as a tax liability. The new asset represents amounts expected to be recovered in future periods in order to pay tax liabilities due in those future periods. Most carriers requesting permission to adopt SFAS-96 proposed to include the asset in the rate base and to deduct both the accumulated deferred tax liability adjustments and the new regulatory liability accounts from the rate base. This proposed process would reduce the asset and the new liabilities at the same rate, thus producing a symmetrical rate base treatment that theoretically should have no revenue requirement impact. Among the requesting parties, only NYNEX proposes to exclude the new regulatory asset and the new deferred tax and regulatory liability accounts from all rate base calculations. NYNEX believes its recommendation is the best way to assure that there will be no revenue requirement impact from the adoption of SFAS-96 now or in some future accounting period.

10. *Proposal.* The accounts we would establish to implement SFAS-96 would enable us to have the accounts we prescribe in Part 32 comparable to those that would be used in generating published financial statements. However, we propose to exclude the new accounts established to implement SFAS-96 from rate base and net income determinations for regulatory purposes. SFAS-96 adjustments would be handled through the new accounts we would establish. Therefore, our proposal does not require a change to Part 65 rules which provide for deducting the interstate portion of deferred taxes recorded in Accounts 4100 and 4340 from the interstate rate base. We believe there are several advantages to this approach. First, no additional complexities will be added to rate base determinations. Second, the new accounts would not be subjected to our joint cost, separations and access rules. Third, there would be reduced risk of SFAS-96 adjustments violating IRS normalization rules, which could conceivably occur if such items as investment tax credit carryforwards are intermingled with other items recorded in Accounts 4100 and 4340 and are used to reduce income tax expenses and the deferred tax liability as SFAS-96 prescribes.[15]

B. Tax liabilities not previously recognized.

11. *Tax timing differences previously accounted for under the flow-through method.* When APB Opinion No. 11 specified that the deferral method of interperiod tax allocation was the appropriate method of accounting for tax timing differences, the Accounting Principles Board, in essence, rejected an accounting method known as the flow-through method. The flow-through method required that income tax expenses of an accounting period equal the amount of income taxes payable for that period. Under the flow-through method, a company would not adjust the income tax expenses recorded in its books for financial or regulatory purposes to reflect the fact that a current increase or decrease in actual tax expense associated with some items would have the opposite effect on actual income tax expenses in one or more future periods.

12. As noted in para. 5, *supra*, this Commission's accounting rules prior to 1988 generally prohibited use of the deferral method in reflecting the tax effects of transactions, except with respect to accelerated depreciation.[16] Thus, the flow-through method was used for all timing differences unrelated to depreciation. When these items unrelated to depreciation reduced income taxes payable in accounting periods prior to 1988, carriers did not reflect on their balance sheets that income taxes payable would be higher in future periods. When the higher taxes became payable, they were recognized for regulatory purposes as a tax expense in the period they became due. If SFAS-96 is adopted, these additional future taxes payable would be recognized as a liability that would be due in future periods. The amount to be recorded would be the future tax effects of these temporary differences. The liability or asset would then represent the probable impact on future revenue requirements.

13. An application of SFAS-96 to subject carriers would require them to record significant tax liabilities attributable to the different book and income tax return treatment of capitalized relief and pension costs, allowances for funds used during construction (AFUDC),[17] social security taxes, and sales and use taxes. This is because the flow-through method of accounting reduced tax expenses reported in earlier years but left no balance sheet recognition of the opposite effect that will occur in later years. Tax liabilities would also be recorded for differences in book and tax treatment of intercompany transactions and reductions in the tax bases of assets as a result of tax credits.[18]

14. For regulated companies, SFAS-96 permits establishment of an asset and liability which merely formalizes in the accounts a result that has occurred due to the use of flow-through accounting in a ratemaking environment. When the benefits of lower taxes are reflected in lower service rates at the time they occur, the burdens of the higher taxes that occur later are reflected in service rates as they become due. Under such circumstances, SFAS-96 recognizes that it would be appropriate to record a liability for these higher taxes and an asset for the probable future revenues that would extinguish the tax liability.

15. *Proposal.* We tentatively conclude that dealing with the tax effects of temporary differences previously accounted for under the flow-through method would require the establishment of one new asset account and a new liability account.[19] The asset account would be established as Account 1437, Recoverable Tax Liabilities, and the new liability account would be Account 4341, Net Noncurrent Deferred Tax Liability Adjustments. The tax effects of these temporary differences would be recorded at the revenue requirement figure needed to settle the related taxes in future periods.[20] At current tax rates, the flow-through amounts would be multiplied by a factor of 1.5151 (1/(1-.34)). The resulting amount would then be multiplied by the 34 percent tax rate. This yields the future revenues to be provided for the extinguishment of the deferred tax liability.

16. The new deferred tax liability adjustment account will retain a distinction between deferred taxes that were related to other timing differences as defined in APB Opinion No. 11 and the kinds of incremental items that are encompassed by the definition of temporary differences under SFAS-96. We thus propose to create a capability for carriers to add together the new deferred tax liability account and the existing deferred tax account for financial statement purposes, yet assure that the new asset account and the newly recognized tax liabilities are handled in a manner that results in little or no revenue requirement impact.[21]

C. Treatment of the Effects of Tax Rate Changes.

17. *Excess Deferred Taxes.* The Tax Reform Act of 1986 (TRA) reduced the maximum marginal corporate tax rate from 46 percent to 34 percent effective July 1, 1987.[22] As a result of this reduction in the tax rate, the carriers' deferred income tax balances contain an excess amount which is the difference between the amounts deferred at the previous higher rates and the amounts that would have been recorded in the deferred tax accounts had the new tax rate of 34 percent been in effect for those previous periods.

18. SFAS-96 has as its intended purpose the determination of current and deferred taxes based on what an entity's actual tax liability will be under currently enacted tax laws at the time financial statements are presented. Since the excess amount in the deferred tax accounts will not be needed to satisfy future tax liabilities at the current 34 percent rate, the excess should no longer be reflected on an entity's books. Thus, SFAS-96 requires unregulated companies to reduce their deferred tax accounts and to increase income by the amount of the excess in the year SFAS-96 is adopted.

19. Regulated telecommunications companies, however, cannot take the entire excess to income immediately because Section 203(e) of the TRA prohibits such action. Section 203(e) requires regulated companies to use the "average rate assumption" method to return excess deferred taxes to ratepayers for Section 167 and 168 property.[23] The average rate assumption method would result in the recovery of the excess generally over the remaining lives of the assets which gave rise to the deferred tax. In order to implement SFAS-96 with respect to the excess deferred taxes, a regulated company would have to establish a regulatory liability account which would be used to reflect reduced rates in future periods according to the recovery allowed by the average rate assumption method.

20. *Proposal.* In accounting for the excess deferred taxes under SFAS-96, we propose to add a second new liability account, Account 4361, Deferred Regulatory Liability, to the Part 32 account structure. Carriers would record the deferred regulatory liability for the excess which is protected by Section 203(e) with an entry debiting (reducing) Account 4341 and crediting (increasing) Account 4361. At the 34 percent tax rate the excess amount would be multiplied by a factor of 1.5151 (1/(1-.34)). This amount would then be amortized to income (returned to the ratepayer) using the average rate assumption method by first periodic adjustments to Accounts 4341 and 4361 and then concurrent flowbacks to income from Accounts 4340 and 4350. This will assure that the protected excess is not flowed back to the ratepayer in a manner that would violate the normalization rules of the Internal Revenue Service. With respect to excess deferred taxes which are not protected by Section 203(e) of the TRA, we propose that the carriers apply SFAS-96 in the same manner as nonregulated enterprises. Thus, for unprotected excess amounts, carriers would adjust their deferred tax balances downward to the 34 percent level and reduce provisions for deferred income taxes so that the entire amount of the unprotected excess is flowed back to the ratepayer in the year of adoption of SFAS-96.[24] On a forward going basis,

adjustments to deferred tax balances necessitated by future tax law changes would be made whenever an excess or deficiency occurs.

D. Other New Considerations Affecting Determination of Deferred Tax Liabilities.

21. *Unamortized Investment Tax Credit Balances*. Under the deferral method prescribed in APB Opinion No. 11, deferred investment tax credit accounting was not viewed as creating a timing difference, and deferred income taxes were not adjusted to reflect tax consequences. SFAS-96 holds that deferral accounting for investment tax credits produces a temporary difference, the tax effects of which should be considered in determining the tax liability for book purposes.[25] Proper implementation of SFAS-96 would require investment tax credit amortizations used to reduce the cost of service to be recorded by translating the unamortized investment tax credit to its revenue requirement impact (multiplying the unamortized investment tax credit balance by a factor of 1.5151 (1/(1-.34)) and then determining the tax effects by multiplying the revenue requirement impact by the current tax rate. The amount thus calculated would reduce the tax liability and be recorded separately as an amount that would reduce rates in future periods.

22. *Proposal*. Under the accounting we propose, the tax consequences of the difference would be translated into a revenue requirement impact and recorded by debiting (reducing) new Account 4341, Net Noncurrent Deferred Tax Liability Adjustments and crediting (increasing) proposed Account 4361, Deferred Regulatory Liability. Thus, the tax consequences would be reflected as a liability to ratepayers for the future reduction in revenue requirements in Account 4361, Deferred Regulatory Liability, at the existing revenue requirement level. Carriers would still credit Account 7210 and charge Account 4320 ratably for the amortization of each year's investment tax credits, but at the same time they would reverse a proportionate amount from Accounts 4341 and 4361. This accounting will assure that the investment tax credit is not flowed through to the ratepayer more rapidly than the Internal Revenue Code permits.

23. *Equity Component of AFUDC*. Under APB Opinion No. 11, the equity portion of AFUDC was treated as a permanent timing difference because the AFUDC - Equity that is capitalized as a part of the cost of construction for book purposes never becomes includable in taxable income. SFAS-96, however, considers the equity portion of AFUDC to be a temporary difference between the book and tax basis of an asset which is to be used in determining tax liability. The equity component of AFUDC produces a temporary difference because the cost of an asset for book purposes includes the equity component of AFUDC and the cost of an asset for tax return purposes does not. SFAS-96 requires the recognition of a deferred tax liability for the tax effects of the temporary difference associated with the equity component of AFUDC.

24. *Proposal*. We propose that the deferred tax liability for the tax effects of the temporary difference associated with the equity component of AFUDC, adjusted to the revenue requirement level (*see* para. 15, *supra*), be recognized by crediting Account 4341, Net Noncurrent Deferred Tax Liability Adjustments, to be consistent with SFAS-96. We are also proposing to record an offsetting debit to Account 1437, Recoverable Tax Liabilities, to recognize the regulatory treatment that has been given to the equity component of AFUDC for ratemaking purposes.

25. *Operating Loss and Tax Credit Carryforwards*. Operating losses and certain tax credits, including investment tax credits, that arise in a current year can be carried forward to reduce taxes payable in future years. In accounting for carryforwards, prior to SFAS-96, unused portions of the carryforward were not utilized to reduce future tax liabilities until the future tax liability was actually incurred. SFAS-96 changes the accounting for carryforwards by requiring them to be recognized currently as a reduction of the deferred tax liability to the extent that temporary differences will result in future taxable income during the allowable carryforward period.

26. If adopted for ratemaking purposes, this treatment, particularly as it relates to investment credits, can conceivably result in a situation where investment tax credits could be used to reduce the cost of service to ratepayers faster than the Internal Revenue Code permits.[26] In addition, the deferred tax liability account may be reduced below levels required by the Internal Revenue Code in order for carriers to receive the benefits of accelerated depreciation.[27]

27. *Proposal*. In order to avoid a conflict with the Internal Revenue Code, we propose to record the effects of these deferred tax liability reductions attributable to unrealized investment tax credit carryforwards in a new account entitled Account 7251, Deferred Tax Liability Adjustments-Net. When investment credit carryforwards would be used under SFAS-96 to reduce the deferred tax liability for book purposes, Account 7251 would be credited and Account 4341 would be debited. As these investment tax credit carryforwards would be realized in tax returns, the related amounts recorded in Account 4341 would be credited and Account 7251 would be debited. The realized investment tax credits would then be accounted for as our rules currently require. This should assure that investment tax credits are not flowed through to ratepayers more rapidly than the Internal Revenue Code permits. We request specific comments on this proposed treatment as well as the presentation of any alternative which would not jeopardize the investment tax credits or the normalization process.

IV. OTHER MATTERS

28. The USOA currently contains language requiring carriers to phase in tax normalization over a period of five years, beginning January 1, 1988, for timing differences unrelated to depreciation. In view of the Bureau's waiver of the phase in period,[28] we propose to delete all references thereto. Finally, if there are other issues with respect to taxes which are not incorporated in the above discussion, carriers are requested to bring them to our attention in their comments on this proceeding.

V. PAPERWORK REDUCTION ACT

29. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed in the Act.

VI. REGULATORY FLEXIBILITY ACT

30. We certify that the Regulatory Flexibility Act is not applicable to the rule changes we are proposing in this proceeding.[29] In accordance with the provisions of Section 605 of that Act,[30] a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this Notice in the Federal Register. As part of our analysis of the proposal described in this Order, however, this Commission has considered the impact of the proposal on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines.[31] The action proposed herein would have a beneficial economic impact on all such telephone companies because their tax accounts for regulatory purposes would be comparable to those shown in their published financial statements.

VII. EX PARTE CONTACTS

31. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

32. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to this Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

VIII. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 218, 220 and 403 and Section 553 of the Administrative Procedure Act, 5 U.S.C. Sec. 553, notice is hereby given of proposed amendments to Part 32 of this Commission's Rules, 47 C.F.R. Part 32 as shown in Appendix A. We hereby give notice that in reaching our decisions in this proceeding we will not necessarily be limited to the comments and reply comments that may be filed, and that we may utilize other information, analyses, and reports, provided that in each such case a copy of the material relied upon will be associated with the record of this proceeding.

34. IT IS FURTHER ORDERED, that interested persons may file comments on the specific proposals discussed in this *Notice* on or before **September 18, 1989.** Reply comments shall be filed on or before **October 3, 1989.** In accordance with the provisions of Section 1.419 of this Commission's Rules and Regulations, 47 C.F.R. Section 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. Copies of the comments will be available for public inspection in the Commission's Docket Reference Room, 1919 M Street, N.W., Washington, D.C.

35. IT IS FURTHER ORDERED, that the Secretary shall serve a copy of this Notice of Proposed Rule Making on state regulatory commissions.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 32, Chapter 1 of the Title 47, Code of Federal Regulations, is proposed to be amended as follows:

1. The authority citation for Part 32 would continue to read as follows:

Authority: Secs. 4(i), 4(j) and 220 as amended; 47 U.S.C. 154(i), 154(j), and 220 unless otherwise noted.

2. Section 32.22 would be amended by revising paragraphs (a), (d) and (f) and removing and reserving paragraph (c) to read as follows:

Sec. 32.22 Comprehensive interperiod tax allocation

(a) Companies shall apply interperiod tax allocation (tax normalization) to all book/tax temporary differences which would be considered material for published financial report purposes. Furthermore, companies shall also apply interperiod tax allocation if any item or group of similar items when aggregated would yield debit or credit entries which exceed or would exceed 5 percent of the gross deferred income tax expense debits or credits during any calendar year over the life of the temporary difference.

The tax effects of book/tax temporary differences shall be normalized and the deferrals shall be included in the following accounts:

4100 Net Current Deferred Operating Income Taxes

4110 Net Current Deferred Nonoperating Income Taxes

4340 Net Noncurrent Deferred Operating Income Taxes

4350 Net Noncurrent Deferred Nonoperating Income Taxes

* * * * *

(c) Reserved

(d) The records supporting the activity in the deferred income tax accounts shall be maintained in sufficient detail to identify the nature of the specific temporary differences giving rise to both the debits and credits to the individual accounts .

* * * * *

(f) The tax differentials to be normalized as indicated herein shall also encompass the additional effect of state and local income tax changes on Federal income taxes produced by the provision for deferred state and local income taxes for book/tax temporary differences related to such income taxes.

* * * * *

3. Section 32.103 would be amended by adding account 1437 to the list of accounts to read as follows:

Sec. 32.103 Balance sheet accounts for other than regulated-fixed assets to be maintained:

Balance Sheet Accounts

Account Title	Class A Account	Class B Account
***	***	***
Recoverable Tax Liabilities	1437	1437
***	***	***

* * * * *

4. Section 32.1437 would be added to read as follows:

Sec. 32.1437 Recoverable Tax Liabilities.

This account shall include amounts of probable future revenue for the recovery of future increases in taxes payable.

5. Section 32.4000 would be amended by adding accounts 4341 and 4361 to the list of accounts to read as follows:

Sec. 32.4000 Instructions for balance sheet accounts - liabilities and stockholders' equity.

Liabilities and Stockholders' Equity Accounts to be Maintained by Class A and Class B telephone companies:

Balance Sheet Accounts

Account Title	Class A Account	Class B Account
***	***	***
Net Noncurrent Deferred Tax Liability Adjustments	4341	4341
***	***	***
Deferred Regulatory Liability	4361	4361
***	***	***

* * * * *

6. Section 32.4100 paragraph (d) would be revised to read as follows:

Sec. 32.4100 Net Current Deferred Operating Income Taxes.

* * * * *

(d) The classification of deferred income taxes as current or noncurrent shall be based on the expected turnaround of the temporary difference.

* * * * *

7. Section 32.4110 paragraph (g) would be revised to read as follows:

Sec. 32.4110 Net Current Deferred Nonoperating Income Taxes.

* * * * *

(g) The classification of deferred income taxes as current or noncurrent shall be based on the expected turnaround of the temporary differences.

* * * * *

8. Section 32.4340 paragraphs (a) and (d) would be revised to read as follows:

Sec. 32.4340 Net noncurrent deferred operating income taxes.

(a) This account shall include the balance of income tax expense related to noncurrent items from regulated operations which have been deferred to later periods as a

result of comprehensive interperiod tax allocation related to temporary differences that arise from regulated operations.

* * * * *

(d) The classification of deferred income taxes as current or noncurrent shall be based on the expected turnaround of the temporary difference.

* * * * *

9. Section 32.4341 would be added to read as follows:

Sec. 32.4341 Net Noncurrent Deferred Tax Liability Adjustments.

(a) This account shall include the noncurrent portion of deferred income tax charges and credits pertaining to Accounts 32.1437, Recoverable Tax Liabilities, 32.4361 Deferred Regulatory Liability and 32.7251 Deferred Tax Liability Adjustments-Net.

(b) This account shall be used to record adjustments to the accumulated deferred tax liabilities recorded in Account 4100 for:

(1) Tax effects of temporary differences accounted for under the flow-through method or treated as permanent differences prior to January 1, 1989.

(2) Reclassifications attributable to changes in tax rates prior to January 1, 1989.

(3) The tax effects of carryforward net operating losses and carryforward investment tax credits expected to reduce future taxes payable that are reported in published financial statements.

(4) Reversals of the tax effects of carryforward net operating losses and carryforward investment tax credits previously recorded in this account at the time they become recognized as reductions in current taxable income and current taxes payable on tax returns.

10. Section 32.4350 paragraphs (a) and (g) would be revised to read as follows:

Sec. 32.4350 Net Noncurrent deferred nonoperating income taxes

(a) This account shall include the balance of income tax expense (Federal, state and local) that has been deferred to later periods as a result of comprehensive interperiod allocation related to nonoperating temporary differences.

* * * * *

(g) The classification of deferred income taxes as current or noncurrent shall be based on the expected turnaround of the temporary difference.

* * * * *

11. Section 32.4361 would be added to read as follows:

Sec. 32.4361 Deferred Regulatory Liability

This account shall include amounts of probable future revenue reductions attributable to future decreases in taxes payable. As reductions occur, amounts recorded in this account shall be reduced with a debit entry and a credit entry to Account 4341, Net Noncurrent Deferred Tax Liability Adjustments.

12. Section 32.6999 paragraph (b) would be amended by adding account 7251 to the other income accounts listing to read as follows:

Sec. 32.6999 General.

(a) ***

(b) Other Income Accounts Listing.

Account title	Class A account	Class B account
***	***	***
Deferred tax liability adjustments-net	7251	7251
***	***	***

* * * * *

13. Section 32.7251 would be added to read as follows:

Sec. 32.7251 Deferred Tax Liability Adjustments-Net.

(a) This account shall be credited to record the tax effects of carryforward net operating losses and carryforward investment tax credits expected to reduce future taxes payable that have been debited to Account 4341, Net Noncurrent Deferred Tax Liability Adjustments.

(b) This account shall be debited for reversals of the tax effects of carryforward net operating losses and carryforward investment tax credits expected to reduce future taxes payable that have been debited to Account 4341, Net Noncurrent Deferred Tax Liability Adjustments.

FOOTNOTES

[1] Section 32.16, Changes in Accounting Standards, requires carriers to adjust their records and accounts to apply new accounting standards prescribed by the Financial Accounting Standards Board (FASB) or successor authoritative accounting standard setting groups in a manner consistent with generally accepted accounting principles (GAAP). Section 32.16 also provides for automatic Commission approval of the change in accounting standards effective 90 days after the carrier informs the Commission of its intent to follow the new standard, unless the Commission notifies the carrier that the new standard should not be adopted. Moreover, Section 32.16 requires carriers to file not only a notice of intention to follow a new standard but also a revenue requirement study analyzing the effects of the new standard for the current year and a projection for three years.

[2] BellSouth, Southwestern Bell, NYNEX, Ameritech, Pacific Telesis, U S West, Statement of Financial Accounting Standards No. 96, Accounting for Income Taxes, 3 FCC Rcd 4645 (1988).

[3] Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, 51 Fed. Reg. 24745, July 8, 1986 and 51 Fed. Reg. 43493, December 2, 1986; *recon. denied in part and granted in part*, 2 FCC Rcd 1086 (1987).

[4] Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles, 102 FCC 2d 964 (1985) (*GAAP Order*).

[5] *See* note 1, *supra*.

[6] The Accounting Principles Board preceded the Financial Accounting Standards Board as the authoritative standard setting body for accounting practices that achieve wide acceptance in the American business community. APB Opinion No. 11 has been in effect in the unregulated business community since 1968.

[7] Deferred tax charges and deferred tax credits are balance sheet items that customarily enter into determinations of net income in one or more subsequent accounting periods. In the telecommunications industry, deferred tax credits normally exceed deferred tax charges by a wide margin. In the balance sheet accounts we prescribe for telecommunications common carriers, the deferred credits are shown on the liability side of the balance sheet net of the deferred charges. The same holds true in financial statements prepared for general use in the investment community.

[8] BellSouth Corporation, Petition for Waiver of Section 32.22 of the Commission's Rules to Permit the Implementation of Flash-Cut Normalization Relating to Tax/Timing Differences Originating in 1988, 2 FCC Rcd 5146 (1987).

[9] Tax Reform Act, Pub.L. No. 99-514, 100 Stat. 2085 (October 22, 1986).

[10] SFAS-96 was originally required in financial statements for fiscal years beginning after December 15, 1988. Earlier implementation was encouraged. However, SFAS-100, issued in December 1988, extended the deadline for implementation of SFAS-96 to fiscal years beginning after December 15, 1989. Earlier implementation was still encouraged.

[11] SFAS-96 permits recording a regulatory asset if it is probable that amounts necessary to settle the additional liabilities will be recovered from customers in future rates.

[12] *See* note 9, *supra*.

[13] The American Telephone and Telegraph Company, Bell Atlantic and GTE, at the request of the Accounting and Audits Division, also provided revenue requirement studies analyzing the effects on their operations of SFAS-96. All the revenue requirement studies received on the effects of SFAS-96 have been placed in the record in this proceeding.

[14] *See* note 9, *supra*. and para. 20, *infra*.

[15] In such circumstances, investment tax credits and the ability to utilize accelerated depreciation for tax purposes could be jeopardized.

[16] The Uniform System of Accounts prescribed in Part 31 of our rules, which was superseded by Part 32 on January 1, 1988, did provide mechanisms for carriers to request authorization to apply the deferral method of accounting for the tax effects of transactions unrelated to accelerated depreciation. *See* 47 C.F.R. §31.176:2. However, grant of such authority was an exception from the norm.

[17] Our rules permit AFUDC on debt and equity funds used in construction projects. Under SFAS-96, the equity portion of AFUDC would be considered because it results in a difference between the tax basis of the asset and the reported amount in financial statements. Another item which creates a difference between the tax basis of the asset and the reported amount in the financial statements is deferred investment tax credits (*See* para. 21, *infra*.)

[18] The Tax Equity and Fiscal Responsibility Act of 1982 permitted a choice of taking the Accelerated Cost Recovery System (ACRS) deduction and a reduced tax credit or the full tax credit with a decrease in ACRS deductions.

[19] Complete implementation of SFAS-96 will require the establishment of still other liability accounts, which are discussed in greater detail in succeeding paragraphs.

[20] The revenue requirement figure takes into account the tax on tax impact inherent in ratemaking. The tax on tax factor recognizes that to recover $1.00 of income tax for ratemaking purposes, the company must be given $1.51 (at the 34% tax rate) in revenues because the revenues are also subject to taxation.

[21] In order to accomplish this result, the new asset and tax liability account will also have to accommodate other changes brought about by SFAS-96 and the Tax Reform Act of 1986. *See* paragraphs 21 through 27, *infra*. The only revenue requirement impact we foresee would then be attributable to the flowback of excess deferred taxes not protected by Section 203(e) of the Tax Reform Act of 1986. *See* paragraph 20, *infra*.

[22] Due to the mid-year implementation of the tax rate reduction in 1987, the effective maximum marginal tax rate for 1987 as a whole was 40 percent.

[23] 26 U.S.C. §§167-168. Sections 167 and 168 deal with different classes of depreciable property.

[24] It is our intention to require the flowback of the unprotected deferred taxes to be reflected in the next annual tariff filing. Moreover, we are proposing that carriers subject to price caps treat the flowback of the unprotected deferred taxes as an exogenous cost item. *See* Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3017-3018 (1989) (Finding that cost changes due to changes in the USOA should be exogenous).

[25] This deferred tax liability approach does not change the accounting for the investment tax credit which would be amortized in a manner consistent with Sections 167 and 168 of the Internal Revenue Code. SFAS-96 holds that when investment tax credits are deferred and amortized, a temporary difference will exist because the cost of an asset for financial reporting purposes will be higher than the tax basis (cost) of that same asset. SFAS-96 states that this temporary difference is deductible in future years as the cost of the asset is recovered.

[26] This would occur if the investment tax credit carryfowards were recorded along with other unamortized investment tax credits and used to reduce the cost of service over the life of the assets to which they relate.

[27] Normalization rules of §§ 167 and 168 of the Internal Revenue Code.

[28] *See* note 8, *supra*.

[29] *See* Competitive, Common Carrier, CC Docket No. 79-252, 85 FCC 2d 1, (1980) (*First Report and Order*).

[30] 5 U.S.C. § 605 (1987).

[31] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We

are nevertheless committed to reducing the regulatory burdens on small telephone companies wherever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MAD RIVER
BROADCASTING COMPANY
(Assignor)

and File No. BALCT-881125KF

CALIFORNIA-OREGON
BROADCASTING, INC.
(Assignee)

For Assignment of License of Television
Station KREQ(TV), Arcata, California

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 18, 1989

By the Commission:

1. The Commission has before it for consideration the above-captioned application for consent to the assignment of the license of station KREQ(TV), channel 23 (IND.), Arcata, California, from Mad River Broadcasting Company (Mad River) to California-Oregon Broadcasting, Inc. (COBI). COBI is the licensee of station KRCR-TV, channel 7 (ABC), Redding, California, and radio stations KFLI(AM) and KEKA-FM, Eureka, California. On February 9, 1989, COBI obtained Commission consent for its acquisition of the construction permit of unbuilt station KDKJ(TV), channel 8, Fort Bragg, California.[1] COBI's acquisition of KREQ(TV) will result in overlap of the predicted Grade B contour of that station with commonly owned KRCR-TV and that of unbuilt station KDKJ(TV). COBI proposes to operate KREQ(TV) "primarily as a satellite" of KRCR-TV,[2] and has requested that the assignment application be granted pursuant to the "satellite exception" to the Commission's duopoly rule for television stations, Section 73.3555(a)(3).[3] Additionally, because KREQ(TV)'s city grade contour encompasses Eureka, the application is subject to the Commission's "one-to-a-market" rule, Section 73.3555(b), which generally prohibits common ownership of aural and television stations in the same market. COBI has requested a twelve-month waiver to divest its interest in stations KFLI(AM) and KEKA-FM.

2. With regard to the proposed satellite operation, COBI contends that a grant of its proposal would be consistent with Section 73.3555 of the Rules. First, it notes that when computed in accordance with the standard prediction method, the Grade B contours of KRCR-TV and KREQ(TV) as well as KDKJ(TV) and KREQ(TV) overlap. However, COBI argues that because of the mountainous terrain separating Redding from the Eureka ADI, reliance on the standard prediction method is inappropriate in this instance. In this connection, COBI submitted the results of an engineering study showing the predicted and supplemental terrain-limited Grade B contours for the stations. COBI claims that the study shows that none of the three terrain-limited Grade B contours of the stations overlaps any of the others. Therefore, COBI maintains that the proposed assignment will neither reduce program diversity nor contribute to any undue concentration of economic power, the twin policy concerns underlining the duopoly rule. Even assuming some overlap, COBI argues that the operation of KREQ(TV) as primarily a satellite of KRCR-TV would be in accord with Commission's satellite policy which permits a television station in a sparsely-settled rural area to operate as a satellite of a co-owned station serving portions of the same area.

3. COBI argues that KREQ(TV) is a struggling UHF independent station, operating in the 187th television market, and that it must compete with two VHF network-affiliated stations, KIEM-TV, channel 3 (NBC), Eureka; and KVIQ-TV, channel 6 (CBS), Eureka. It notes that Arcata is a small town of 12,340 persons, located in Humboldt County which has a population of 113,700. COBI avers that the Eureka-Arcata market area is substantially smaller and more rural than several communities where the Commission has inferred the appropriateness of a television satellite operation because of the small market size without submission of a detailed economic analysis. *E.g.*, *Sainte Limited*, 3 FCC Rcd 185 (1988); *Capitol Broadcasting Co.*, 54 RR 2d 811 (1983). Based on its experience in operating broadcast stations and its knowledge of the northern California area, COBI claims that the Eureka-Arcata market will not support a stand-alone independent television station. It points out that Humboldt County has experienced a significant economic decline in its principal industries of lumbering and fishing. Additionally, it observes that the county unemployment rate of 9.9% is almost double the California statewide average of 5%, and the national rate of 5.4%. Studies of the market conducted by Mad River, COBI states, indicate that the economy will remain weak for the "near-term" future, and that even if there was significant economic growth, the market still could not support a stand-alone independent UHF station in competition with the local VHF network-affiliated stations.

4. COBI further asserts that a statement from the President of Mad River reveals that, since going on the air in August, 1987, KREQ(TV) has lost money every month. During the period from February 1, 1988, to December 31, 1988, the statement shows that the station's total income was $110,000, while the operating costs exceeded $400,000, and that the station's projected budget for 1989 anticipates a loss for the year of approximately $170,000.[4] COBI states that in June, 1988, Mad River decided to sell KREQ(TV) because of continued losses and little prospect of future profit. Thus, COBI notes, a professional station broker, was retained by Mad River for the purpose of finding qualified buyers for the station. In a statement submitted at COBI's request, the broker maintains that, after three months of intensive work and contacts with approximately 20 prospective buyers, he was unsuccessful in selling the station or entering into negotiations for a sale. It was not until he had discussions with a representative from COBI, which explored COBI's plan to rebroadcast the programming of KRCR-TV, was he successful in finding a buyer for the station. The broker concludes, based on his experience with seeking buyers for the station, the small size of the market, the presence of VHF

network affiliates, and the financial status of KREQ(TV), that if this pending transaction is not approved, no purchaser will be found to operate the station as a stand-alone independent station, and that the station will go dark by the end of 1989 unless Mad River elects to finance continuing losses.

5. Additionally, COBI states that the Economic Research Institute of Humboldt State University in Arcata (ERI) conducted a survey of independent broadcast media buyers (advertising representatives) in Humboldt County to obtain information concerning the economic prospects for a stand-alone independent television station serving Eureka-Arcata. The ERI found that the independent stand-alone operation of KREQ(TV) was not successful because it was not responsive to the requirements of these advertising representatives. Specifically, the advertising representatives claim that (1) there is an overabundance of radio media available in Humboldt and Del Norte Counties for local advertisers; (2) the inventory of commercial television advertising in Humboldt County is inadequate because of the absence of an ABC television affiliate to serve their clients fully; and (3) the supply of television programs now provided by KREQ(TV) is undesirable in terms of its audience reach, a fact confirmed by the television spot prices of this station, which range as low as $3.00 per spot for quantity purchases.

6. COBI argues that the proposed assignment will further the public interest by ensuring the first off-air ABC network programming service in the Eureka-Arcata area, albeit a satellite operation. Moreover, COBI contends that the economics associated with rebroadcasting much of KRCR-TV's basic program service will enable it to originate a significant amount of local news and public affairs programming, and to broadcast approximately 40 hours per week of KRCR-TV's nonentertainment programming. It notes, that when operating, KREQ(TV) broadcast no local programming. COBI states that the KREQ(TV) studio will be staffed, full time, with all resources needed to allow the station to broadcast live news, public affairs programming, and local announcements. It proposes to broadcast five to seven minutes of local news daily (Monday-Friday) from KREQ-TV's local studio in Eureka, which will be a separate and distinct segment of KRCR-TV's 5:30 or 6:30 p.m. local newscast. Additionally, it proposes to originate and broadcast 30 minutes of public affairs programming, per quarter, at 5:00 p.m. on Sundays.

7. Concerning its 12-month waiver request to divest its interest in stations KFLI(AM) and KEKA-FM, COBI says that the Commission has frequently recognized that the public interest is served by permitting a reasonable period for the orderly disposition of a station. Further, it contends that creating a UHF/radio combination is not automatically precluded under Note 4 to Section 73.3555 where the transaction serves the public goals. COBI contends that the grant of the temporary waiver in this case would serve the public interest by ensuring continued local service to the Eureka-Arcata area.

DISCUSSION

8. In the past, we have authorized satellite stations in situations where overlap would exist between the parent and the satellite station as a means of providing television service to small communities having an insufficient economic base to support a full-service television station. One means of carrying out the goal of bringing service to these communities is reflected in Note 5 to Section 73.3555 of the Rules, which, as noted in footnote 2 above, relaxes our multiple ownership rules for a station operating as a satellite or "primarily" as a satellite. When satellites were first considered, they were authorized only in communities having no local off-the-air television station. *Multiple Ownership Rules*, 45 FCC 1728 (1964). Over the years, however, that standard has evolved in order to provide the public in smaller markets with a choice of programs. Additionally, we have stated that the economic justification for a satellite operation may be inferred from the small size of the market or from the small size of the community of license at the fringe of a larger market. *Capitol Broadcasting Co.*, 54 RR 2d at 814, n. 9; *Pete J. Stathakas*, 59 RR 2d 169 (1985), *recon. denied*, 60 RR 2d 1293 (1986).

9. On the basis of the information before us, we believe that a sufficient showing has been made to justify operation of station KREQ(TV) primarily as a satellite of station KRCR-TV. It appears that the extremely rough terrain to the south and east of Arcata and Mendocino County would effectively eliminate most of the actual signal overlap of KREQ(TV) and KRCR-TV, and that the terrain between KREQ(TV) and KDKJ(TV) is such that actual overlap of these stations will be significantly less than that shown using the standard prediction method. While we cannot state that no actual overlap would exist, we believe the areas affected would be small.

10. Arcata is a small community located in the 187th market. COBI has submitted persuasive information to support its contention that the Eureka-Arcata market will not support a stand-alone independent, full-service television station. Humboldt County, where Arcata is located, has experienced a significant decline in its principal industries, and the county unemployment rate is much higher than the state and national averages. The station's total income from February 1988 to December 31, 1988, was only $110,000, and its operating expenses exceeded $400,000. While KREQ(TV) is the only station licensed to Arcata, it must compete with two VHF network-affiliated stations in nearby Eureka, each of which places a city-grade contour over Arcata. Although KREQ(TV) is licensed as a full-service station, it has faced severe financial impediments to its ability to originate local programming. The station must also compete with numerous radio broadcast media for a limited amount of local advertising revenue. As a satellite of KRCR-TV, KREQ(TV) would be able to respond to the advertising needs of media buyers which, in turn, would substantially increase its revenues.

11. Moreover, COBI has committed itself to maintaining the station's local studio in Eureka for daily broadcasts of local programming. The proposed satellite operation will provide the first off-the-air ABC network programming in the Eureka-Arcata market. Viewers will also receive more than 40 hours of KRCR-TV's weekly non-entertainment programming. In view of the foregoing, we believe that the applicant has demonstrated that the proposed satellite operation will serve the public interest in the circumstances presented.

12. We turn next to the request for temporary waiver of the Commission's "one-to-a-market" rule, Section 73.3555(b). On the basis of the information before us, it appears that the request is consistent with Commission precedent and will serve the public interest.[5] We do not

believe that forcing an immediate sale of stations KFLI(AM) and KEKA-FM for diversity's sake alone would be in the public interest. Such a forced sale could unnecessarily restrict the value of the stations and could artificially limit the range of potential buyers to those with immediate access to the necessary capital, which may preclude the purchase of the station by local or minority-controlled groups. Thus, requiring immediate divestiture of the radio stations could work an economic hardship on COBI without offsetting public interest benefits. *See Metromedia Radio & TV*, 102 FCC2d 1334 (1985), *recon. denied*, 59 RR 2d 1211 (1986). We therefore find that a 12-month period is appropriate to effectuate the orderly disposition of stations KFLI(AM) and KEKA-FM.

13. In view of the above circumstances, and finding the applicants fully qualified, we believe that the proposed parent-satellite operation, and the limited waiver of Section 73.3555(b) will serve the public interest, convenience and necessity.

14. Accordingly, IT IS ORDERED, That Mad River Broadcasting Company's application to assign the license of station KREQ(TV) to California-Oregon Broadcasting, Inc. IS GRANTED, subject to the condition that California-Oregon Broadcasting, Inc. divest itself of its interests in stations KFLI(AM) and KEKA-FM no later than 12-months from the consummation of this transaction.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The KDKJ(TV) sale was consummated on March 20, 1989. In approving that transaction, the Commission consented to COBI's operation of KRCR-TV and KDKJ(TV), with overlapping Grade B contours, as a parent-satellite combination pursuant to the "satellite exception" to the duopoly rule for television stations. *See Kathleen Bailey d/b/a Capital Foothill Broadcasters*, 4 FCC Rcd 1429 (1989).

[2] A 100-percent satellite station retransmits all of the programming of its parent, while a station categorized as "primarily a satellite" airs most of its parent's programs but produces less than five percent of its programming locally. *See e.g., Amaturo Group, Inc.*, 68 FCC 2d 899 (1978).

[3] Section 73.3555(a) of the Commission's Rules ordinarily bars the grant of an application that would result in the overlap of the Grade B signal contours, predicted in accordance with Section 73.684, between commonly owned television stations. However, Note 5 to Section 73.3555 states that the duopoly prohibition will not be applied to cases involving television stations which are operated primarily as satellites. Also, under Section 73.684(f), an applicant may make a supplemental terrain-limited contour showing to demonstrate that the duopoly restriction of Section 73.3555 is inapplicable.

[4] By letter dated May 17, 1989, Mad River Broadcasting Company indicated that, due to financial difficulties, station KREQ(TV) ceased operations on April 30, 1989. *See* 47 C.F.R. Section 73.1740(a)(4).

[5] Our recent changes in the one-to-a-market waiver standard did not alter our temporary waiver procedure. *See Knoxville Channel 8 Limited Partnership*, 4 FCC Rcd 4760 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-112

In the Matter of

Amendment of Part 74 of the
Commission's Rules to Provide
for Satellite and Terrestrial
Microwave Feeds to Noncommercial
Educational FM Translators

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 18, 1989

By the Commission: Commissioner Quello concurring and issuing a statement.

INTRODUCTION

1. On March 24, 1988, the Commission adopted a *Report and Order* in MM Docket No. 86-112, 3 FCC Rcd 2196 (1988), which revised its rules to allow noncommercial educational FM (NCE-FM) translator stations assigned to reserved channels (channels 200-220), and owned and operated by their primary stations, to receive signals for rebroadcast via any technical means the licensee deems suitable. Before the Commission are separate petitions for reconsideration filed by the National Association of Broadcasters ("NAB"); the Association of Maximum Service Telecasters, Inc. ("MST"); and Salem Broadcasting Services ("Salem"). A fourth petition for reconsideration was submitted, jointly, by National Public Radio, the National Federation of Community Broadcasters, the Intercollegiate Broadcasting Systems, Inc., the Office of Communication of the United Church of Christ, and the People For the American Way ("NPR").[1] In addition, subsequent to the filing of these petitions a "Joint Proposal for Noncommercial Educational FM Translators" ("Joint Proposal") was submitted jointly by The Moody Bible Institute of Chicago, NPR, National Federation of Community Broadcaters, Intercollegiate Broadcasting Systems, and Family Stations Inc. The Joint Proposal, which proposes several amendments to the rule adopted in the *Report and Order* in this proceeding, was placed in the above captioned docket and specifically made available for public comment.[2]

2. In light of the comments we received in support of the Joint Proposal, this *Memorandum Opinion and Order* amends the rule adopted in the *Report and Order* of this proceeding to incorporate several of its provisions. The new rule will require that, during a three-year transition period, applicants for NCE-FM translator stations assigned to reserved channels (channels 200-220), and owned and operated by their primary stations, proposing to use alternative signal delivery may be required to make a special showing that an alternative NCE-FM frequency remains available.

BACKGROUND

3. The FM translator service was instituted in 1970 as a means to supplement the primary service provided by full facility FM stations. The Commission authorized FM translators for the specific and limited purposes of providing FM radio service to unserved areas, extending additional FM service to underserved areas, and improving service to areas within the predicted 1 mV/m contours of primary FM stations. As part of the rules developed for the translator service, the Commission restricted both commercial and noncommercial FM translators to rebroadcast signals received directly over-the-air from their primary stations or another translator. On October 31, 1985, the Moody Bible Institute of Chicago (Moody) petitioned the Commission to permit NCE-FM translators to rebroadcast signals delivered via satellite and terrestrial microwave facilities. Moody further proposed that such signal delivery be limited to NCE-FM translators on reserved channels (200-220) and owned and operated by the noncommercial primary station to be rebroadcast.

4. In response to the Moody petition, the Commission instituted this rule making proceeding, culminating in the *Report and Order* which deleted the requirement that NCE-FM translators owned and operated only by their primary stations and assigned to reserved channels receive signals from their primary stations, or another translator, directly over-the-air. The revised rule permits use of signal delivery means that include, but are not limited to, satellite and terrestrial microwave facilities. The Commission stated that this use of alternative signal delivery methods would serve the public interest by facilitating improvements in the quality of signals these translators rebroadcast and enabling such stations to reach larger numbers of listeners. The Commission also found that this rule change is consistent with its policy of authorizing translators as a secondary service for reaching areas and populations unable to receive satisfactory FM service because of distance or intervening terrain obstructions.[3]

5. As a consequence of this action, we received the instant petitions for reconsideration. Petitioners uniformly oppose the rule change adopted in the *Report and Order*, arguing that the new rule undermines the concept of localism, increases interference problems, and thwarts the growth of full-power NCE-FM service to the public. They request that the Commission reconsider its action in the *Report and Order*. The petitioners ask, generally, that the Commission vacate or substantially modify the alternative signal delivery rule. They seek varying forms of relief and recommend that the Commission: adopt less drastic alternatives; consolidate these issues in the comprehensive rule making concerning FM translator issues;[4] and adopt an interference protection standard for interference to Channel 6.

6. The Joint Proposal proposes to amend the modifications of the Commission's rules regarding alternative signal delivery adopted in the *Report and Order*. The Joint Proposal would allow NCE-FM translators which are owned and operated by the primary station licensee to use alternative signal delivery if they comply with a series of conditions that are designed, according to the parties to the Joint Proposal, to assure continued interference-free radio service in the noncommercial educational FM band and also allow expansion of service through the use of NCE-FM translators. The Joint Proposal also provides for a three-year transition period during which an applicant must show a second available NCE-FM frequency. The

parties state that this period of time will permit public radio stations the time they need to seek funding and apply for NCE-FM translators on these frequencies. We summarize the petitions for reconsideration and the comments on the Joint Proposal, in turn, below.

COMMENTS ON RECONSIDERATION

7. *Petitions*. The parties filing petitions for reconsideration argue that the Commission should have considered the adverse impact of alternative signal delivery NCE-FM translators on local public radio service to the public. Petitioners assert that the *Report and Order* fails to address legitimate concerns over the erosion of local, full service public radio and the statutorily mandated obligations of full service noncommercial radio licensees. Petitioners add that under the alternative-signal delivery rule, a primary noncommercial educational FM station will be allowed to feed NCE-FM translators located in far distant states and different regions of the country, thus depriving the local community of control of the airwaves which serve it, and listeners of the ability to influence the programming rebroadcast by a distant satellite for translator rebroadcast. They state that this undermines the fundamental concept of localism requiring broadcasters to make available service responsive to the local community and that "superstation" use of local noncommercial educational FM spectrum contravenes fundamental communications policies and the concept of localism embodied in Section 307(b) of the Communications Act.

8. Petitioners also argue that the Commission's action will result in the immediate filing of multiple applications for NCE-FM translators using alternative delivery technologies, resulting in the depletion of already limited NCE-FM spectrum, thus precluding the development or expansion of local public radio service in certain communities. Petitioners point out that if a nationwide operator of NCE-FM translators builds a translator in a sizable central city far from the primary station, then the local NCE-FM station cannot later use the frequency already authorized to the nationwide operator to improve or extend service by establishing a NCE-FM translator near the fringe of its 1 mV/m contour. Petitioners also contend that it is the local NCE-FM broadcaster who is likely to provide service to unserved or underserved fringe or sparsely populated areas, not the nationwide translator operator. Petitioners argue that the rule change will accelerate exhaustion, and encourage monopolization, of the reserved FM band by national, NCE-FM operators. As a result, local and regional NCE-FM operators who must delay applications for translator operation under the new signal delivery rule change because of fiscal constraints may not have noncommercial educational FM spectrum in the reserved channels available for their use.[5] Petitioners also question the adequacy of Commission staff resources to complete technical review of the anticipated filing of hundreds or thousands of alternative-delivery NCE-FM translator applications.

9. Petitioners further argue that the revised signal delivery rules will result in an increased potential for interference since NCE-FM translator applications are not held to the same prohibited contour overlap standards as full service NCE-FM stations. The petitioners state that the existing translator rules assume that a translator is located in reasonable proximity to the primary station, but when a translator is far removed from the primary station, monitoring of translator operation becomes more difficult, and alleged interference from a translator located in a different region from the primary station may be difficult to resolve. They further argue that while the Commission has asserted that the signal delivery rule change will not impede the growth of full service radio stations, since NCE-FM translators would be authorized on a secondary, non-interference basis, secondary status may be illusory because of the lack of limitations on NCE-FM translators and the practical problems and expenses of getting an authorized station to cease operation.[6] Petitioners argue that the *Report and Order* neglected to address this problem.[7]

10. *Oppositions*. Moody states that the Commission has not acted "arbitrarily and capriciously" in adopting the rule change since it followed rule making procedures and afforded full and fair opportunity for comment. Moody contends that the Commission has fully considered and addressed the question of the possible impact on full power NCE-FM stations in the *Report and Order* and that no new evidence, data or arguments have been raised which would require the Commission to reconsider its previous finding on this point. Moody states that localism will not be adversely affected by this rule change because a NCE-FM station has always been able to build and operate a NCE-FM translator beyond the predicted 1 mV/m field strength contour of its station, limited by Section 74.1231 of the rules restricting translators to the over-the-air rebroadcast of a primary station. Moody asserts that permitting terrestrial microwave and satellite technology is merely a more efficient means of providing a quality signal for rebroadcast and does not change the fundamental nature of NCE-FM translator service.

11. Family Stations, Inc. (FSI) asserts that given the Commission's explicit commitment to implement the rule change in a manner consistent with its mandate to promote full service stations, there is no reason to believe that public radio stations will not receive the full protection of existing Commission interference rules, which were unchanged when the Commission modified the signal delivery rule. FSI notes that petitioners' argument that the rule change heightens the potential for interference is unsupported since the technical protections of Section 74.1203 of the rules give full service stations absolute protection in cases of actual interference, so that if the interference caused by the translator cannot be promptly eliminated, the translator has no alternative but to cease operation until the interference has been eliminated. Therefore, FSI asserts, the signal delivery rule change does not and cannot thwart the development of full service public radio stations.

12. *Reply to oppositions*. NAB states that by allowing satellite delivery to NCE-FM translators, the Commission is facilitating the creation of a national network of low power radio translators, fed from a single primary station, in the noncommercial educational spectrum, rather than the extension of service to unserved and underserved areas. In this respect, NAB points out that satellite feeds are a method of distributing an audio signal to unlimited numbers of locations, thereby permitting translator licensees in remote markets to compete, with minimal investment, against full service stations who carry a large economic burden of supplying local issue responsive programming, and that this will undermine the development of full service local NCE-FM radio stations. NAB and NPR stress that the Commission should consider all

translator issues in a comprehensive manner in its *Notice of Inquiry* on FM translator issues since there is no reason to consider NCE-FM translator issues separately from the identical issues that concern commercial translator frequencies. NAB expresses concern over the "risk" that the changes in this *Report and Order* will be used as a "bootstrap" justification for changes in the commercial FM band.

THE JOINT PROPOSAL

13. The Joint Proposal proposes to amend the rules adopted in the *Report and Order* in this proceeding. It would allow for use of alternative signal delivery to NCE-FM translators which are owned and operated by the licensee of the primary station to be rebroadcast, subject to certain conditions. The parties state that the conditions the applicants must meet are designed to assure continued interference-free radio service in the noncommercial educational FM band and to allow expansion of service through the use of NCE-FM translators. These conditions include a showing by all applicants for NCE-FM translators which demonstrates a lack of harmful interference to existing FM stations and NCE-FM translators. These conditions also incorporate the interference protection criteria contained in Section 73.509 of the Commission's rules, with the exception of that section's requirements relating to second and third adjacent channel FM stations and translators. During a three-year transition period, the applicant for a NCE-FM translator proposing to use alternative signal delivery must also show on an allocation map using the criteria found in Section 73.509 that there is available an alternate noncommercial FM frequency. Applicants would not have to demonstrate alternate frequency availability if the proposed translator is within 50 miles of the primary station's 1 mV/m contour or is more than 100 miles from any noncommercial FM station. The parties state that this period of time will permit public radio stations the time they need to seek funding and apply for NCE-FM translators on these frequencies. The parties to the Joint Proposal state that if the Commission adopts the Joint Proposal and does not extend alternative signal delivery eligibility to non-licensee owned NCE-FM translators as proposed in the *Further Notice* in this proceeding during the transition period, they will withdraw their petitions for reconsideration.

14. *Comments*. NPR filed in support of the Joint Proposal, stating that it provides for a "middle ground" between prohibiting the use of alternate signal delivery for NCE-FM translators and the unconditional authorization of such translators as adopted in the *Report and Order*. Further, NPR argues that the Joint Proposal is more consistent with the communications policy of localism than the 1988 rule revision. NPR points out that the Joint Proposal specifies that the Commission will apply explicit interference standards at the application stage for NCE-FM translators operating on reserved FM channels. These standards assure, NPR argues, that the Commission will not authorize a NCE-FM translator unless the licensee demonstrates that under the criteria of Section 73.509 of the Commission's rules there is no potential for interference to any other FM station or translator. NPR further notes that because the Joint Proposal requires that applicants must demonstrate that an alternate noncommercial FM frequency is available for the proposed coverage area, the availability of noncommercial FM spectrum for the development and expansion of local public radio stations is assured, at least during the transition period in which this requirement applies. NPR also maintains that the proposal is designed for easy Commission administration. Standard engineering data can be readily reviewed by Commission staff, and there is no need for complex calculations or other time-consuming tasks. Therefore, deficient applications can be identified quickly.

15. Moody and FSI concur with NPR, stating that the Joint Proposal is a reasonable compromise between the needs of existing NCE-FM translator operators and applicants and the need to retain some spectrum space for future users. However, FSI suggests that the Commission consider special procedures for existing NCE-FM translators displaced either by a full service station or changed circumstances that cause interference by the NCE-FM translator. Under such circumstances FSI states that the translator licensee should be allowed to file an application and be protected from competing applications; to use alternate delivery technologies while being exempt from new requirements set forth in the Joint Proposal; and, to use non-reserved frequencies to preserve an existing service upon a demonstration that no noncommercial frequency is available.[8]

16. FSI and MST state that the Commission should adopt reasonable interference standards to foreclose disputes concerning interference to Channel 6. To accomplish this, FSI claims that Section 73.525 of the Commission's rules concerning channel 6/noncommercial FM interference standards be applied to determine the acceptability of a new NCE-FM translator application.

17. In its opposition comments, London Bridge Broadcasting (LBB) states that the spread of translators must be controlled or the nation's smaller communities will become completely reliant on larger city stations. LBB argues that commercial FM translators carrying distant signals compete for advertising revenues. Similarly, LBB alleges that NCE-FM translators carrying distant signals attract charitable contributions that might otherwise fund local service. Noncommercial FM service in all but the largest markets will be greatly weakened in the face of this potential siphoning of local funding. LBB maintains that such an adverse impact is contrary to the concept of localism embodied in the Communications Act. Accordingly, LBB suggests that the Commission reject the Joint Proposal and adopt the following principles: (a) NCE-FM translators outside the 1 mV/m contour of the primary station should be permitted where there are no local noncommercial full service stations within a specified distance, and a channel is available for the establishment of a local station; and (b) NCE-FM translators should be licensed to local organizations, not the licensees of distant originating stations. LBB also states that the Commission should exempt an educational institution with multiple campuses that operates a full power station on one campus and wants to serve other campuses with NCE-FM translators from the requirement of establishing that another channel is available for a local station. LBB argues that such translators should be viewed more as "satellite" radio stations than translators.

18. Western Translators, Inc. (WTI) expresses concern that the Joint Proposal may have a chilling effect on further development of NCE-FM translator service. It argues that Commission adoption of the Joint Proposal will

deprive the public of service by forcing the warehousing of available channels for future use. To mitigate the effect of this aspect of the Joint Proposal, WTI suggests that the Commission permit applicants to make a showing of channel availability by using any available channel including commercial class A, B or C channels.[9] WTI also supports a non-interference showing for co-channel, first adjacent channel FM stations and FM translators and noninterference to Channel 6 television operation.

19. The New Mexico Commission on Public Broadcasting (NMCPB) argues that the Joint Proposal should be modified so that the burden of showing the lack of harmful interference to existing FM stations and NCE-FM translators is limited to applicants for NCE-FM translators proposing alternate delivery modes. NMCPB also contends that given New Mexico's topography and geography, the distance specifications contained in the Joint Proposal are inapplicable to its terrain since such specifications fail to protect areas potentially served by in-state stations from "poaching" by national networking applicants. NMCPB states that the distance specification should also be imposed upon any authorized translators which rebroadcast full power stations. NMCPB also states that the three-year transition period provides an insufficient amount of time for planning, filing and securing local and NTIA funding for the expansion of local public radio service.

20. NAB urges the Commission to delay implementation of its *Report and Order* until it has completed its general examination of FM translator issues in the *Notice of Inquiry*. NAB argues that there should be stricter interference standards for FM translators and that the Commission should not allow satellite or microwave feeds absent greater interference protection standards. The NAB further suggests that instead of using the prohibited overlap interference standards of Section 73.509 of the Commission's rules, the Commission should adopt minimum distance separation standards. The NAB claims that adoption of this standard would be a far better use of Commission resources than permitting expansion of the NCE-FM translator service and waiting for parties to file interference complaints.

21. *Replies*. The Oregon Commission on Public Broadcasting (OCPB) supports the Joint Proposal. It states that Commission adoption of the Joint Proposal will allow licensees such as OCPB to implement statewide NCE-FM translator systems using microwave feeds, without depriving prospective applicants of an opportunity to apply for a full service FM station in any community. OCPB opposes suggestions made by the NAB that implementation of the compromise be deferred pending resolution of other issues.[10]

DISCUSSION

22. We continue to believe that it is useful and desirable to permit NCE-FM translators assigned to reserved channels and owned and operated by their parent stations to use means for delivery of their primary station's signal other than over-the-air reception. The restriction on signal delivery to over-the-air technology limits both the area which can be served and the quality of the signal that can be received by the public. As the Commission concluded in the *Report and Order*, this rule change permits extension of NCE-FM radio service to unserved and underserved areas and facilitates improvement in the service provided by many existing NCE-FM translators.

23. We also believe that the benefit of "localism" will not be reduced by the modest rule changes embodied in the *Report and Order*, as modified by the instant Order. A noncommercial FM station has always been permitted to own and operate a NCE-FM translator beyond its 1 mV/m contour. Thus, our action did not change our policy that, in effect, allows the use of NCE-FM translators for extending service beyond the primary station's "local" area to unserved or underserved areas.

24. Moreover, noncommercial entities may reap significant benefits from these rule changes. By connecting several translators to their parent station by microwave or satellite, noncommercial entities may obtain some of the efficiencies and cost savings traditionally associated with networking. Since noncommercial stations typically operate with far lower budgets and smaller audiences than commercial stations, we believe it is appropriate to facilitate methods of operation that might lower their costs, increase the technical quality of their signals and improve their audiences.

25. Furthermore, we reiterate that all NCE-FM translators will operate on a secondary basis, restricted to the rebroadcast of a primary station and subject to the requirement that the translator operator must resolve any interference problems that arise with a full-service station or cease operation of the translator. Thus, it is unlikely that the existence of a translator would prevent the development of additional full-service FM stations for which there exists sufficient listener demand.

26. Several commenters object to alternative signal delivery technologies for FM translators arguing that it would allow these translators to provide service to areas that are at a greater distance from their parent station than was possible under the previous rule. These parties are concerned that Commission resources will be swamped with NCE-FM translator applications seeking to take advantage of this new authority. They maintain that such an increase in these FM translator (applications and) service comes at the expense of the local public broadcasters' ability to use NCE-FM translators to enhance their local service to the public. We can find no public interest benefit to arbitrarily limiting translator siting, especially when such action would reduce signal quality and raise costs to licensees.

27. Several of these same parties also support the provision in the Joint Proposal that would require NCE-FM translator applicants proposing to use alternative signal delivery to demonstrate the availability of an alternate NCE-FM frequency in the local community. This proposal is an alternative solution to their concern that NCE-FM frequencies remain available for translator use by a local public radio station or community group to enhance local service. We believe this aspect of the Joint Proposal is superior to the earlier rules, in that NCE-FM translators are afforded the benefits of using alternative signal delivery technologies while, at the same time, the availability of an alternative NCE-FM frequency for local translator use is assured. These parties also suggest that the reservation of these frequencies is necessary only for a transition period of three years. They maintain that three years will provide sufficient time for local public radio stations to obtain funding to apply for a NCE-FM translator.

28. Upon consideration of the commenters' concerns on this issue expressed in the Joint Proposal, we conclude that the rules adopted in the *Report and Order*, permitting

unrestricted use of alternative signal delivery for licensee owned and operated NCE-FM translators, should be amended to incorporate this provision of the Joint Proposal. Thus, our amended rules provide that an applicant for a NCE-FM translator seeking authorization to use alternative signal delivery will have to make a showing that at least one alternative NCE-FM frequency that provides comparable signal coverage to the same area encompassed by the applicant's proposed 1 mV/m contour remains available.[11] Applicants will be required to make such a showing during a transitional period that will extend three years from the effective date of this *Memorandum Opinion and Order*.[12] Applicants need not make such a showing if the proposed NCE-FM translator is within 80 kilometers (approximately 50 miles) of the 1 mV/m contour of the primary station to be rebroadcast or is greater than 160 kilometers (approximately 100 miles) from any NCE-FM radio station. We believe that 80 kilometers is the approximate distance within which an existing station could employ conventional signal delivery to a translator. Furthermore, we believe that an NCE-FM translator located greater than 160 kilometers from any NCE-FM station, and employing alternate signal delivery, would not impede the expansion of other established NCE-FM radio service.

29. We believe that the limitations we are imposing on unrestricted alternative signal delivery authority will have minimal effect in most cases. While NCE-FM translator applicants proposing to locate more than 80 kilometers outside of the 1 mv/m contour of the primary station, or within 160 kilometers from any NCE-FM radio station must establish the availability of at least one other frequency for an additional translator, we do not not anticipate that in most rural areas this requirement will be difficult to show or represent a significant constraint. This is because there are likely to be many unused frequencies in such areas. It is only in densely populated urban areas that it may be relatively difficult to demonstrate that there would be an additional channel available for another translator. However, in urban areas there is also likely to already exist a number of full-service noncommercial and commercial stations. Hence, in such areas the benefits from authorizing a translator to rebroadcast the signal of a distant FM station should be less than in rural areas, because listeners are likely to already be exposed to a variety of local FM stations.

30. Nevertheless, we view this action as transitional in nature. It is intended to give NCE entities who had not anticipated these rule changes sufficient time to plan and acquire funding for new facilities without being concerned that channel availability would be pre-empted by a distant licensee. We are cognizant of the delays local public radio interests face in obtaining the state and federal grants needed to fund a translator. While we believe that a two-year transition period might have provided them with a sufficient lead time, out of an abundance of caution, we have adopted the suggested transition period of three years.

31. We also note that NAB reiterates its argument that regardless of any specific merits of the Joint Proposal, any further implementation of the *Report and Order* in this proceeding should be delayed until the Commission has completed its general examination of FM translator issues in the outstanding *Notice of Inquiry*. We see no rationale for delaying the implementation of the rule amendments developed in this proceeding. These new rules do not change our underlying policies for NCE-FM translators and therefore do not predetermine or prejudge the resolution of the various issues under consideration in the *Notice of Inquiry*. Any such delay serves only to postpone the benefits to the public of expanding opportunities for providing quality FM radio service to unserved and underserved areas.

32. As a final matter, we are not amending the rules to incorporate the provision in the Joint Proposal which suggests modification of the interference protection requirements embodied in our current rules.[13] The Commission's rules currently provide procedures whereby an FM translator must resolve interference problems it may cause with any full-service broadcast station. Commenters have not provided any valid reason why the limited rule change we are adopting today necessitates amending the existing rules. Furthermore, we note that possible amendments to the existing interference protection requirements is an issue under consideration in the comprehensive *Notice of Inquiry* concerning all aspects of our FM translator rules and policies. We believe that interference issues are more appropriately addressed in the context of the *Notice of Inquiry*. We also reject LBB's proposal to exempt educational institutions with multiple campuses that operate a full power station on one campus and want to serve other campuses with NCE-FM translators from the requirement of establishing that another channel is available for a local station. The modified rules we are adopting herein provide for local demand for NCE-FM translators. In addition, we believe that it would be inappropriate to carve out specific exceptions to the rules at this time. In any event, we note that any party may file for waiver of our rules at any time. Finally, we reject NMCPB's proposal that the geographical requirements apply to other NCE-FM translators. To include NCE-FM translators would unnecessarily increase the number of applicants required to make a special showing.

PROCEDURAL MATTERS

33. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's updated final analysis is as follows:

I. Need for and purpose of the rules. The Commission concludes that it is both useful and desirable to adopt changes to the permissible input signal delivery authority for NCE-FM translators operating on reserved channels. These rule changes provide for the expansion of NCE-FM translator service to unserved or underserved areas while maintaining the public interest considerations of localism.

II. Summary of issues raised by public comment in response to the final regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. Issues Raised. No issues were raised specifically in response to the final regulatory flexibility analysis. However, in an effort to resolve the issues raised in the *Report and Order*, several of the parties submitted a Joint Proposal which contain a series of conditions that parties contend are designed to assure continued radio service in the NCE-FM band and to allow expansion of service through the use of NCE-FM translators. The applicant must demonstrate during a limited transition period the availability of an alternative NCE-FM frequency on an allocation map. Applicants would not have to demon-

strate alternative frequency availability if the proposed NCE-FM translator meets certain geographical stipulations.

B. *Assessment.* The Commission believes that it will promote the public interest to modify the rule adopted in the *Report and Order* to ensure the availability of an additional local noncommercial frequency.

C. *Changes made as a result of comments.* The Commission has adopted a modified version of the Joint Proposal. The applicant will now have to show, during a transition period of three years, that the NCE-FM translator meets certain geographical requirements, or show that an alternate frequency is available before the application can be approved.

III. Significant alternatives considered and rejected. The significant alternatives were to proceed with the rules as adopted in the *Report and Order*; modify the rules; or, rescind the rules. The Commission concludes that the most desirable policy is to adopt the modified Joint Proposal. The rules adopted herein strike a balance between the public interest embodied in ensuring the development and expansion of local public radio service and increasing NCE-FM service to unserved and underserved areas.

34. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of these new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

35. The Secretary shall cause a copy of this *Memorandum Opinion and Order* to be sent to the Chief Counsel for Advocacy of the Small Business Administration.

36. Accordingly, IT IS ORDERED That under the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, Part 74 of the Commission's rules and regulations IS AMENDED as set forth in Appendix B below EFFECTIVE **October 2, 1989.** IT IS FURTHER ORDERED That the Petitions for Reconsideration filed by the Association of Maximum Service Telecasters, Inc.; the National Association of Broadcasters; Salem Broadcasting Services; and, a joint petition for reconsideration filed by National Public Radio, the National Federation of Community Broadcasters, the Intercollegiate Broadcasting Systems, Inc., the Office of Communication of the United Church of Christ, and the People For the American Way ARE GRANTED TO THE EXTENT ADOPTED HEREIN and DENIED in all other aspects. Finally, the petition for rule making filed by the Association of Maximum Service Telecasters is DENIED.

37. IT IS FURTHERED ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties filing Reconsideration Petitions

1. Association of Maximum Service Telecasters, Inc.
2. National Association of Broadcasters
3. Joint Petition by National Public Radio, National Federation of Community Broadcasters, Intercollegiate Broadcasting System, Office of Communication of the United Church of Christ, and People for the American Way
4. Salem Broadcasting Services

Opposing/Responding Parties

1. Family Stations, Inc.
2. Moody Bible Institute of Chicago, Inc.
3. Oregon Commission on Public Broadcasting

Informal Responding Parties

1. Pacific Lutheran University
2. Wichita State University

Replies To Responses

1. National Association of Broadcasters
2. Joint Reply by National Public Radio, National Federation of Community Broadcasters, Intercollegiate Broadcasting System, Office of Communication of the United Church of Christ, and People for the American Way

Parties filing comments on the Joint Proposal

1. Association of Maximum Service Telecasters
2. Family Stations, Inc.
3. London Bridge Broadcasting, Inc.
4. Moody Bible Institute Chicago
5. National Association of Broadcasters
6. Joint comments by National Public Radio, National Federation of Community Broadcasters and Intercollegiate Broadcasting System
7. New Mexico Commission on Public Broadcasting
8. Western Translators, Inc.

Opposing/Responding Parties

1. Association of Maximum Service Telecasters, Inc.
2. Moody Bible Institute of Chicago
3. Joint reply by National Public Radio, National Federation of Community Broadcasters and Intercollegiate Broadcasting System
4. New Mexico Commission on Public Broadcasting
5. Oregon Commission on Public Broadcasting
6. Rocky Mountain Corporation for Public Broadcasting

APPENDIX B

Part 74 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, and 303.

2. Section 74.1231 is amended by revising paragraph (b) to read as follows:

§74.1231 Purpose and permissible service.

* * * * *

(b) Except as provided in paragraphs (f) and (g) of this section, an FM translator may be used only for the purpose of retransmitting the signals of an FM broadcast station or another FM translator station which have been received directly through space, converted, and suitably amplified. However, a noncommercial educational FM translator operating on a reserved channel [Channels 200-220] and owned and operated by the licensee of the primary non-commercial educational FM station it rebroadcasts may use alternative signal delivery means including, but not limited to, satellite and microwave facilities, if the applicant complies with either subparagraph (1) or (2):

(1) The applicant demonstrates that:

(i) The transmitter site of the proposed FM translator station is within 80 kilometers from the predicted 1 mV/m contour of the primary station to be rebroadcast; or,

(ii) The transmitter site of the proposed FM translator station is more than 160 kilometers from the transmitter site of any authorized full service noncommercial educational FM station; or,

(iii) The application is mutually exclusive with an application containing the showing as required by §74.1231(b) (2)(i) or (ii); or,

(iv) The application is filed after October 1, 1992.

(2) If the transmitter site of the proposed FM translator station is more than 80 kilometers from the predicted 1 mV/m contour of the primary station to be rebroadcast or is within 160 kilometers of the transmitter site of any authorized full service noncommercial educational FM station the applicant must show that:

(i) An alternative frequency can be used at the same site as the proposed FM translator's transmitter location and can provide signal coverage to the same area encompassed by the applicant's proposed 1 mV/m contour: or,

(ii) An alternative frequency can be used at a different site and can provide signal coverage to the same area encompassed by the applicant's proposed 1 mV/m contour.

* * * * *

FOOTNOTES

[1] Several parties filed in response to the petitions for reconsideration. The complete list of commenters is contained in Appendix A.

[2] *See Order*, MM Docket No. 86-112, 54 FR 11549, March 21, 1989. A complete list of parties submitting comments on the Joint Proposal is contained in Appendix A.

[3] The Commission also adopted a *Further Notice of Proposed Rule Making* (*Further Notice)* in this docket that proposes to amend the Commission's rules to permit all NCE-FM translators assigned to reserved frequencies (channels 200-220) to rebroadcast signals that are relayed by any technical means. 3 FCC Rcd 2202 (1988).

[4] *See, Notice of Inquiry*, MM Docket No. 88-140, 3 FCC Rcd 3664 (1988).

[5] Salem contends that while licensees of primary noncommercial FM stations may receive authorizations to operate distant FM translators on reserved channels rebroadcasting on satellite in large, well-served cities, local community groups in communities with few noncommercial FM services may not receive such authorization. This issue is being addressed in the *Further Notice* in MM Docket No. 86-112, and will not be discussed further here.

[6] Petitioners note that the Commission stated in 1984 that "[a]lthough translators would be on notice of their secondary rights to a channel, once established, the Commission may have difficulty in the forced removal of an established service." *Memorandum Opinion and Order*, Docket No. 19918, 98 FCC 2d, 35 at 41-43 (1984) ("*FM Translator Service*"), *recon. denied*, FCC 84-574, released December 4, 1984 (unpublished decision).

[7] MST reasserts the arguments it made in its comments on the *Notice* in which it proposed that the Commission screen NCE-FM translator applications for compliance with "mimimum standards for protection of Channel 6." MST disputes the *Report and Order's* conclusion dismissing its arguments as beyond the scope of the issues raised in that proceeding *(Report and Order, supra* at 2197 n. 12). MST again argues that elimination of the signal delivery rule will multiply the potential for interference with Channel 6 and recommends that precautions be taken at the outset to avoid interference potential to Channel 6. We determined in the *Report and Order* that MST's proposals are beyond the scope of this proceeding. *See Report and Order, supra* at 2197 n. 11 and 12. MST has not supplied any new reasons for us to reconsider its arguments. Therefore, pursuant to Section 1.429(i) of the Rules, MST's reconsideration arguments will be dismissed as repetitious. MST requests that, in the event that the issues it raises are not suitable for reconsideration, its petition be treated as a request for rule making. We see no need to initiate a rule making proceeding on this issue, because the Commission is now considering interference issues as they pertain to all FM translators, commercial as well as NCE-FM, in the context of the *Notice of Inquiry* on FM translators. Furthermore, we emphasize that under the current rules, the translator must resolve any alleged interference.

[8] FSI's proposals to modify the Commission's rules and policies respecting the secondary status of NCE-FM translators go beyond the scope of the issues considered in this proceeding which relate solely to amending the signal delivery rules for NCE-FM translators. Therefore, FSI's proposals will not be discussed herein.

[9] WTI's proposal to make commercial channels available to applicants for NCE-FM translators goes beyond the scope of the current proceeding and will not be addressed herein. The issue of expanding the available channels available to applicants for FM translators is under consideration in the FM translator *Notice of Inquiry*.

[10] The remaining parties filing reply comments reiterate the positions they take in their initial comments.

[11] The complete text of the amended rules is contained in Appendix B.

[12] All applications for NCE-FM translators, proposing to use alternative signal delivery that have been tendered but not accepted for filing will be required to amend their applications within 90 days of the effective date of this *Order* to conform with the additional criteria set forth herein.

[13] Because all parties were on notice that the Commission was considering the Joint Proposal, any modification to that proposal that results in less stringent requirements requires no additional notice to the public. Therefore, the Commission will not entertain petitions for reconsideration that claim lack of notice. *See WBEN, Inc. v. United States*, 396 F.2d 601, 616 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968).

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In Re: Amendment of Part 74 of the Commission's Rules to Provide for Satellite and Terrestrial Microwave Feeds to Noncommercial Educational FM Translators

Consistent with my decision in the *Report and Order* in this proceeding, I believe the public interest will be served by allowing alternate delivery techniques for translators in the noncommercial FM band. The issue is rather difficult because I take very seriously the Commissions obligation to promote local service. We must carefully balance the need to develop the noncommercial band against the fundamental objective of promoting *local* noncommercial service. The rule adopted by the Commission strikes a reasonable balance.

I am concerned with the potential for additional interference resulting from these new rules. I would have preferred that the Commission utilize the interference standards contained in the relevant provisions of Section 73.509 as application criteria. As the commenters correctly point out, the "no interference" provisions of Section 74.1203 do not apply at the application stage. They are applicable only to actual operation of the translator. I believe a superior policy would insure that there is no interference *before* an application is granted.

Nevertheless, I can concur with the item because the Commission is considering interference standards in the context of its general *Notice of Inquiry*. Standards established in that proceeding will, of course, also apply to noncommercial translators. Accordingly, I shall scrutinize interference considerations in that proceeding.

It is worth noting that the policy issues before us in this proceeding, *i.e.* fostering development of the noncommercial band, do not necessarily extend to the commercial band. In recent years, the Commission has embarked on a policy of maximizing spectrum use in the commercial FM band. This already crowded field as well as the economics of commercial broadcasting may require a tightening, as opposed to a relaxation, of our translator rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-221

In the Matter of

Amendment of Section 73.202(b), RM-6177
Table of Allotments,
FM Broadcast Stations.
(Fort Valley and Wrightsville
Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 1, 1989; Released: August 18, 1989

By the Chief, Allocations Branch:

1. At the request of Fox Valley Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3159 (1988), proposing the substitution of Channel 292C2 for Channel 292A at Fort Valley, Georgia, and the modification of its license for Station WQBZ(FM) to specify operation on the higher powered channel. In addition, Wrightsville Broadcasting was issued an *Order to Show Cause* why its permit for Station WIML(FM) should not be modified to specify operation on Channel 260A in lieu of Channel 292A at Wrightsville, Georgia. Petitioner filed comments and reply comments supporting the allotment of Channel 292C2 to Fox Valley. KB Broadcasting filed a counterproposal requesting allotment of Channel 293A to Irwinton, Georgia, as a second FM service.[1] Kirby Broadcasting Company ("Kirby") filed a petition for leave to file comments and supplemental comments. Petitioner filed an opposition to Kirby's comments.[2]

2. Channel 260A at Wrightsville conflicts with a proposal to upgrade the facilities of Station WMCD at Statesboro, Georgia, in a separate proceeding, MM Docket 88-218. Therefore, as an alternate channel we will allot Channel 298A in lieu of 260A to Wrightsville, Georgia.

3. The *Notice* gave Wrightsville Broadcasting Company until July 25, 1988, to file a written statement regarding the proposed substitution and further indicated that if no written statement was filed by that date, consent to the modification of license as proposed in the *Order to Show Cause* would be presumed. Since a written statement has not been received at the Commission, the licensee will be deemed to have consented to the modification. Petitioner, in its comments, reaffirms its commitment to reimburse the licensee of Station WIML(FM) for the reasonable costs of changing its frequency. Therefore, we shall substitute Channel 298A for Channel 292A at Wrightsville, Georgia.

4. We believe the public interest would be served by the substitution of Channel 292C2 for Channel 292A at Fort Valley, Georgia, since it could provide the community with an expanded FM service. The channel substitution can be made in compliance with the minimum distance separation requirements of the rules, provided that petitioner relocate his transmitter site 8 kilometers (5 miles) east of Fort Valley for operation on Channel 292C2.[3] In addition, the substitution of Channel 298A for Channel 292A at Wrightsville can be made in compliance with the minimum distance separation requirements of the rules at its present site.[4]

5. As requested, we shall herein modify the license of Station WQBZ(FM) to specify operation on Channel 292C2 in lieu of Channel 292A in accordance with Section 1.420(g) of the Commission's Rules.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 2, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Fort Valley, Georgia	250A, 292C2
Wrightsville, Georgia	298A

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WQBZ(FM), Fort Valley, Georgia IS MODIFIED, to specify operation on Channel 292C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WIML(FM), Wrightsville, Georgia, IS MODIFIED, to specify operation on Channel 298A in lieu of Channel 292A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License except for the channel as

specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the licensee of Station WIML(FM) as follows: Wrightsville Broadcasting Co., c/o Charles Walters, Route 2, Box A, Barnesville, Georgia 30204.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] KB Broadcasting withdrew its counterproposal on October 17, 1988.

[2] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Here, Kirby's comments were filed December 7, 1988, long after August 26, 1988, the last day for filing comments or replies in this proceeding. In support of acceptance of its late comments, Kirby notes that it filed a counterproposal in a separate proceeding, MM Docket No. 88-460, and that the counterproposal "impacts upon" the proposals in the instant proceeding. The late filed pleading have not been accepted for consideration herein, in accordance with Section 1.415(d) of the Commission's Rules. The mere fact that Kirby filed a separate counterproposal in another proceeding does not provide good cause for acceptance of late filed comments in this proceeding, especially where its proposal in the other proceeding would be untimely were it treated as a counterproposal in this proceeding.

[3] The coordinates for this allotment are North Latitude 32-33-12 and West Longitude 83-47-59.

[4] The coordinates for this allotment are North Latitude 32-42-24 and West Longitude 82-43-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-361

In the Matter of

Amendment of Section 73.202(b), RM-6718
Table of Allotments,
FM Broadcast Stations.
(Beulah, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1989; Released: August 18, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Roger L. Hoppe II (petitioner), requesting the allotment of FM Channel 221A to Beulah, Michigan, as that community's first FM broadcast service. Petitioner filed information in support of the proposed but failed to indicate his intention to file an application for the channel. Petitioner should do so in comments.

2. We believe petitioner's proposal warrants consideration. Channel 221A can be allotted to Beulah, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Channel 221A, Traverse City, Michigan, would have conflicted with Channel 221A at Beulah. However, the license for Station WCCW-FM, Traverse City, was modified to specify operation on Channel 298A in lieu of Channel 221A in MM Docket 87-529. *See* 3 FCC Rcd 4024 (1988). That action was effective on August 12, 1988.[2] Since the allotment of Channel 221A to Beulah is within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government is required.

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Beulah, Michigan, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Beulah, Michigan	—	221A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 10, 1989,** and reply comments on or before **October 25, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roger L. Hoppe II
8420 Deadstream Road
R.R. #1, Box No. 51G
Honor, Michigan 49640

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

Jerrold Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for Station WCCW-FM,
Traverse City, Michigan)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 221A at Beulah are 44-37-36 and 86-05-54.

[2] A Notice of Proposed Rule Making was released on February 1, 1989, in Docket 88-620, proposing the substitution of Channel 298C2 for 298A at Traverse City.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-362

In the Matter of

Amendment of Section 73.202(b),	RM-6694
Table of Allotments,	RM-6893
FM Broadcast Stations.	
(Monroeville and Thomasville Alabama)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1989; Released: August 18, 1989

By Chief, Allocations Branch:

1. Before the Commission for consideration are two separately-filed petitions for rule making. The first was filed on behalf of WJDB Radio, Inc., ("WJDB"), licensee of Station WJDB(FM), Channel 237A, Thomasville, Alabama, seeking the substitution of Channel 244C2 for Channel 237A and modification of its license accordingly (RM-6694). The second petition, filed on behalf of Hub City Broadcasting Corporation ("Hub"), licensee of Station WYNI(AM), Monroeville, Alabama, requests the allotment of Channel 237C3 to that community as its second local FM service (RM-6893). The latter proposal is contingent upon Station WJDB(FM) vacating Channel 237A at Thomasville.[1] Therefore, these proposals will be considered together.

2. We believe the proposals warrant consideration in view of the expressed desire for a wider coverage area FM station to serve the public interest at each community. Our review of the proposals confirms the availability of Channel 244C2 at Thomasville and Channel 237C3 at Monroeville. Both channels can be allotted in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2]

3. In view of the above, we shall propose the substitution of Channel 244C2 for Channel 237A at Thomasville, Alabama, as requested. Additionally, we shall propose to modify the Class A license of Station WJDB(FM) in the event Channel 244C2 is substituted for Channel 237A at Thomasville. However, in conformity with Commission precedent, should another interest in the Thomasville proposal be expressed, the modification could not be made unless at least one additional equivalent channel is available to accommodate other expressions of interest. *See* Section 1.420(g) of the Commission's Rules.

4. Accordingly, in order to provide expanded service to Thomasville and Monroeville, the Commission considers it appropriate to seek comments on the proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to those communities, as follows:

City	Channel No. Present	Proposed
	OPTION I	
Monroeville, Alabama	257A	237C3, 257C2[3]
Thomasville, Alabama	237A	244C2
	OPTION II	
Thomasville, Alabama	237A	244C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 10, 1989,** and reply comments on or before **October 25, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

Jeffrey D. Southmayd, Esq.
Southmayd Powell & Taylor
1764 Church Street, N.W.
Washington, DC 20036
(WJDB Radio, Inc.)

and

M. Scott Johnson, Esq.
Catherine M. Grofer, Esq.
Gardner, Carton & Douglas
1001 Penn. Ave., NW
Suite 750-N
Washington, DC 20004
(Hub City Broadcasting Corporation)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. Ail submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The distance between Thomasville and Monroeville is 57 kilometers whereas 138 kilometers is required between Class A and C3 co-channels.

[2] Coordinates for Channel 244C2 at Thomasville are 31-54-42 and 87-44-24, and for Channel 237C3 at Monroeville 31-31-18 and 87-19-30.

[3] Channel 257C2 has been requested in RM-6695. Since that petition seeks a co-channel upgrade of the petitioner's Class A facilities, the proposal is being considered in a separate proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-591

In the Matter of

Amendment of Section 73.202(b),	RM-5845
Table of Allotments,	RM-5935
FM Broadcast Stations.	RM-5992
(Scottsboro, Alabama; Trenton, Georgia; Signal Mountain, Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1989; Released: August 18, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* ("*Notice*"), 3 FCC Rcd 59 (1988), issued in response to petitions filed by Kea Radio, Inc. ("Kea"), licensee of Station WKEA(FM), Channel 252A, Scottsboro, Alabama, RA-AD of Trenton, Inc. ("RA-AD"), and SonCom, Inc. ("SonCom"). Kea requested the substitution of Channel 251C2 for Channel 252A and modification of its license to specify operation on the higher powered channel. RA-AD requested the allotment of Channel 251A to Trenton, Georgia, as that community's second local FM service. SonCom requested the allotment of Channel 251A to Signal Mountain, Tennessee, as a first FM service. The three proposals are mutually exclusive. Kea and SonCom filed comments supporting their respective proposals. RA-AD failed to file comments supporting its proposal.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. Therefore, in accordance with Commission policy, since no interest was expressed in the allotment of Channel 251A to Trenton by any party, no further consideration will be given to that proposal.

3. We noted in the *Notice* that Kea's modification proposal and SonCom's allotment proposal are separated by less than the minimum distance required by Section 73.207(b) of the Commission's Rules.[1] No alternate channels are available to accommodate the proposals. Therefore, the proposals must be comparatively considered according to the allotment priorities stated in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) First aural service
(2) Second aural service
(3) First local service
(4) Other public interest matters

Co-equal weight is given to priorities (2) and (3).

4. Neither proposal would result in first or second aural service. SonCom's proposal would result in a first local service for Signal Mountain. Kea's proposal for an enhanced FM service to the areas surrounding Scottsboro falls under the fourth priority. Kea has made no showing as to why, despite our allotment priorities, its proposal should be preferred over SonCom's proposal. Therefore, we believe the public interest would be served by the allotment of Channel 251A to Signal Mountain, Tennessee, as that community's first local broadcast service.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 2, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Signal Mountain, Tennessee	251A

6. IT IS FURTHER ORDERED, That the petitions for rule making filed by Kea Radio, Inc. (RM-5845) and RA-AD of Trenton, Inc. (RM-5935) ARE DISMISSED.

7. The window period for filing applications on Channel 251A at Signal Mountain, Tennessee, will open on **October 3, 1989,** and close on **November 2, 1989.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The distance between Channel 251C2 at Scottsboro at a site 24.5 kilometers southeast and Channel 251A at Signal Mountain would be 68.7 kilometers, whereas a separation of 163 kilometers is required.

[2] Reference coordinates for Channel 251A at Signal Mountain are 35-05-33 and 85-22-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-178

In the Matter of

Amendment of Section 73.202(b),	RM-6118
Table of Allotments,	RM-6439
FM Broadcast Stations.	
(Kremmling and Widefield, Colorado)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1989; Released: August 18, 1989

By the Chief, Allocations Branch:

1. At the request of Grand Lake Broadcasting, Inc. (petitioner), licensee of Station KRKY-FM (formerly KTLD-FM), Channel 292A, Kremmling, Colorado, the Commission has before it the *Notice of Proposed Rule Making* ("*Notice*"), 3 FCC Rcd 2539 (1988), proposing the substitution of Channel 292C2 for Channel 292A at Kremmling and the modification of petitioner's license to specify the higher power channel. Petitioner filed supporting comments. Tippie Communications, Inc. (COLO) ("Tippie"), licensee of Station KKLI-FM (formerly KKQX-FM), Channel 292A, Widefield, Colorado, filed comments and a counterproposal proposing the substitution of Channel 292C1 for Channel 292A at Widefield and modification of its license to specify the higher power channel, and the substitution of Channel 232C2 for Channel 292A at Kremmling. Petitioner filed reply comments objecting to Tippie's counterproposal, claiming that terrain factors, the lack of an existing power source, and the improbability of obtaining consent from the U.S. Forest Service for construction of a transmitter at the proposed site preclude the use of Channel 232C2 at Kremmling. Tippie filed a supplement to its counterproposal and motion for leave to supplement its counterproposal proposing the substitution of Channel 292C2, and not Channel 292C1, at Widefield. Tippie claims that its amended counterproposal does not conflict with petitioner's proposal.

2. Tippie's request for the substitution of Channel 292C2 rather than Channel 292C1 at Widefield removes any conflict between the proposals in this proceeding. A Commission engineering analysis confirms that Channel 292C2 can be allotted to Kremmling and Widefield in compliance with the Commission's minimum distance separation requirements.[2] We believe the public interest would be served by the substitutions of Channel 292C2 for Channel 292A at Kremmling, and Channel 292C2 for Channel 292A at Widefield, because in each instance the substitutions would provide a first expanded coverage FM service to the respective communities.

3. In accordance with Section 1.420(g) of the Commission's Rules, we herein modify the licenses of Stations KRKY-FM and KKLI-FM to specify operation on Channel 292C2 in lieu of Channel 292A.

4. Accordingly, pursuant to the authority found in Section 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Section 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 2, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel Number
Kremmling, Colorado	292C2
Widefield, Colorado	292C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of Grand Lake Broadcasting, Inc., Station KRKY-FM, Channel 292A, Kremmling, Colorado, and Tippie Communications, Inc. (COLO), Station KKLI-FM, Channel 292A, Widefield, Colorado, ARE MODIFIED, effective **October 2, 1989,** to specify operation on Channel 292C2 and Channel 292C2, respectively, in lieu of their Class A frequencies, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the "Motion for Leave to Supplement Counterproposal" submitted by Tippie Communications, Inc. (COLO) IS GRANTED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Widefield has been added to the caption in this proceeding.

[2] Reference coordiantes for Channel 292C2 at Kremmling are 40-04-58 and 106-22-39, with a site restriction of 2.3 kilometers (1.4 miles) northeast of the community to prevent a short-spacing to Channel 291A at Basalt, Colorado. Reference coordinates for Channel 292C2 at Widefield are 38-44-47 and 104-51-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-24

In the Matter of

Amendment of Parts 73 and 76
of the Commission's Rules
Relating to Program
Exclusivity in the Cable
and Broadcast Industries

ORDER DENYING STAY REQUEST

Adopted: August 4, 1989; Released: August 21, 1989

By the Commission: Commissioner Dennis concurring and issuing a statement at a later date.

INTRODUCTION

1. The Commission has before it for consideration a "Joint Request for Stay of Effective Date Pending Judicial Review," filed on July 3, 1989, by United Video, Inc., Century Communications Corporation, United Cable Television Corporation, Texas Cable T.V. Association, Inc., Tribune Broadcasting Co., and The Community Antenna Television Association, Inc. (hereinafter collectively referred to as "Joint Petitioners" or "Petitioners"), and three Oppositions filed on July 10, 1989, by National Association of Broadcasters and Association of Independent Television Stations, Inc. (hereinafter referred to as "NAB/INTV"), the Motion Picture Association of America, Inc. ("MPAA") and Meredith Corporation ("Meredith"), respectively. Joint Petitioners request that the Commission stay the effective date of amendments to the program exclusivity rules as applied to syndicated programming, which it adopted in the *Report and Order* in the above-captioned proceeding, 3 FCC Rcd 5299 (1988), and further amended on reconsideration in its *Memorandum Opinion and Order*, 4 FCC Rcd 2711 (1989).

2. In the *Report and Order*, the Commission reinstituted syndicated exclusivity (or "syndex") rules applicable to cable systems. These rules permit broadcasters to negotiate with their program suppliers for exclusive exhibition rights with respect to syndicated (*i.e.*, non-network) programming carried by cable systems located within certain geographic parameters. In taking this action, we explained that the ability to show programs on an exclusive basis is generally recognized as a valuable and legitimate business practice in both the television and cable industries and that *only* television broadcasters of syndicated programming have been denied the opportunity to bargain for this right with respect to video programming. All others, we noted, enjoy the ability to obtain exclusivity. Only by restoring syndicated exclusivity rights would this competitive imbalance in the marketplace be corrected and consumer welfare enhanced. We predict that under these rules the marketplace will create an environment that is more conducive over the long run to the production, diversity, responsiveness, quality and distribution of programming, thereby providing consumers with a larger and more optimal mix of programming.

3. Because we anticipated that reinstitution of the syndex rules would require some kind of adjustment period, we initially established a one-year transition period for cable compliance with the rules, but later extended the compliance date to January 1, 1990, largely as a result of the additional changes made to the rules on reconsideration in the aforementioned *Memorandum Opinion and Order*. Prior to reconsideration, Joint Petitioners filed petitions for review of the *Report and Order* with the United States Court of Appeals for the District of Columbia Circuit, and they now request that the Commission stay the effective date of the syndex rules until 120 days after "final disposition" by that court.

SUMMARY OF ARGUMENTS

4. In their Request for Stay, Joint Petitioners submit that a stay is warranted under the test for preliminary injunctive relief established in *Virginia Petroleum Jobbers Association v. FPC* ("*Virginia Petroleum*"), 259 F.2d 921 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* ("*Holiday Tours*"), 559 F.2d 841 (D.C. Cir. 1977). First, they contend that they have a high likelihood of success on the merits of their jurisdictional, constitutional and procedural challenges to the syndex rules pending before the court of appeals. (Alternatively, Petitioners state that, at the least, their appeal presents serious legal questions.) Second, Petitioners argue that failure to grant the requested stay will cause irreparable harm by abridging the first amendment rights of both cable operators and cable subscribers, and by forcing cable operators to invest millions of non-refundable dollars in equipment that will no longer be necessary or otherwise useful if the syndex rules are overturned. Third, Petitioners assert that, in comparison, other interested parties will suffer no harm by a grant of the requested stay. Finally, Petitioners argue that the public interest favors a grant of the requested stay because the syndex rules will result in massive blackouts of cable television channels, violations of first amendment rights, a decrease in program diversity and subscriber rate increases.

5. In opposition to Joint Petitioners' request for stay, NAB/INTV, MPAA and Meredith each assert that Petitioners have failed to satisfy any of the four criteria necessary to justify a stay. In addition, NAB/INTV and Meredith both urge the Commission to deny the request on equitable grounds, in view of the fact that the request was filed over three months after we released our *Memorandum Opinion and Order* disposing of various petitions for reconsideration in this proceeding, in which time local broadcasters have expended considerable resources to secure and provide notice to cable systems regarding syndicated exclusivity rights.

DISCUSSION

6. It is well established that to support a request for a stay of a Commission order pending judicial review, the petitioner must demonstrate that: (1) it has made a strong showing that it is likely to prevail on the merits of its appeal; (2) failure to grant the stay would cause

irreparable injury to petitioner; (3) issuance of a stay would not substantially harm other interested parties; and (4) issuance of a stay would be in the public interest. *Virginia Petroleum*, 259 F.2d at 925; *Holiday Tours*, 559 F.2d at 843-44. If the last three factors strongly favor the party requesting the stay, then in lieu of making the requisite showing that it is likely to prevail, the petitioner need only make a substantial case on the merits. *Holiday Tours*, 559 F.2d at 843.[1] In addition, the petitioner must demonstrate that the irreparable injury is "certain and great . . . actual and not theoretical," and that the "harm will *in fact* occur." *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original).

7. After careful and thorough examination of the request for stay and the oppositions filed thereto, we find that the showings made by Joint Petitioners are repetitive of matters specifically considered and rejected by the Commission previously, and that Petitioners have failed to meet the burden of the established four-prong test described above. Accordingly, we deny the request for stay.

8. *Likelihood of Success on the Merits*. Joint Petitioners have neither made a strong showing that they are likely to prevail on appeal nor a substantial case on the merits. The Commission, in both its *Report and Order* and *Memorandum Opinion and Order*, dealt extensively with the jurisdictional, constitutional and procedural challenges which Petitioners briefly discuss in their request for stay, and the Commission found these challenges unconvincing. *See Report and Order*, 3 FCC Rcd at 5320-25; *Memorandum Opinion and Order*, 4 FCC Rcd at 2711-17. Nor have Petitioners raised any new legal arguments that lead us to believe that these challenges either pose a strong likelihood of success on appeal or have substantial merit. In any event, an evaluation of the Petitioners' request under the three remaining factors of the *Virginia Petroleum/Holiday Tours* test reveals that the balance of the equities tips sharply against granting a stay.

9. *Irreparable Injury*. Joint Petitioners assert that two types of irreparable harm will occur unless the Commission stays the effective date of the syndex rules. First, they state that failure to grant a stay will abridge the first amendment right of cable operators "to transmit broadcast programming for which they have full copyright clearance, as well as the protected right of the viewing public to receive such programming via cable." Joint Petition at 4. As we observed in the *Report and Order*, however, syndex rules – which merely enforce and protect individuals' ability to negotiate and obtain exclusive rights in programming – do not violate the first amendment. *See Report and Order*, 3 FCC Rcd at 5325. Consequently, the operation of the syndex rules will not cause irreparable injury by infringing either cable operators' or the viewing public's constitutional rights. Moreover, we note that the court of appeals has adopted an expedited schedule for briefing and oral argument on Petitioners' appeal, and in the unlikely event the court does perceive first amendment problems, we expect that the court will act well in advance of the January 1, 1990, date when syndex rights can first be enforced.

10. Second, Petitioners argue that the syndex rules will inflict irreparable injury of an economic nature if the court of appeals overturns these rules after they have gone into operation. Specifically, Petitioners contend that the syndex rules will force cable operators to invest millions of non-refundable dollars in deletion and switching equipment, which assertedly can be used only for syndex purposes, and in subscriber notification mailings. Petitioners have failed to sustain their burden of demonstrating irreparable injury for several reasons. One, the investment costs for equipment appear grossly inflated because Petitioners ignore alternatives to deletion, such as negotiations with local broadcasters and program suppliers, and alternative, lower-cost equipment or manual operations, which can accomplish switching and deletion functions adequately in the short term. In addition, for the reasons set forth in the *Memorandum Opinion and Order*, we do not believe that the costs of equipment sufficient for accomplishing syndex operations (particularly in the short term) cannot be recouped to a large degree by using such equipment for other purposes, through resale or by negotiating a reasonable "trade in" arrangement with the equipment supplier. *See Memorandum Opinion and Order*, 4 FCC Rcd at 2719-20. Petitioners' reliance on the representations of only one supplier regarding return policies for certain types of deletion/switching equipment does not convince us that equipment costs for other types of adequate equipment or equipment from other sources cannot generally be recouped.[2] Two, Petitioners' claim of irreparable injury is speculative because they have failed to give any indication of the degree of program substitution that may be necessary; rather, they appear to assume that every distant signal carried will be subject to massive deletions. At this point, however, when the deadline for local broadcasters to provide notice for pre-existing contracts containing exclusivity provisions has expired, Petitioners surely could have made some estimate of the number of requests for syndex protection they will be expected to honor in January. Three, Petitioners' estimates regarding mailing costs to notify subscribers of the impending changes caused by the syndex rules are unconvincingly high. Petitioners do not appear to have considered the substantial savings that could be made by using cost-effective means of providing such notice (*e.g.*, providing computerized notes with monthly billing statements, running notices in printed program guides, use of on-screen notices).[3] In sum, while we do not doubt that there will be costs associated with implementation of the syndex rules, Petitioners have failed to demonstrate that these costs rise to the level of an irreparable injury sufficient to justify a stay. Moreover, as explained below, the harm that would occur to other interested parties and to the public if we granted the stay request outweighs the costs that Petitioners will bear.

11. *Harm to Other Parties*. Contrary to Petitioners' assertions, staying the effective date of the syndex rules would cause substantial harm to other interested parties. As we concluded in the *Memorandum Opinion and Order*, "[s]ubstantial audience diversion is an ongoing problem, and local broadcasters, with each ensuing month, lose revenues and remain at a distinct competitive disadvantage vis-a-vis cable." *Memorandum Opinion and Order*, 4 FCC Rcd at 2721. The Commission has already extended the date for compliance with the syndex rules by over four months, and a further open-ended delay, as requested by Petitioners, will only compound the harm being sustained by the absence of the rules. In contrast, the cable industry and superstation interests have had ample time to prepare for and mitigate their economic burdens; by the time syndex rules become enforceable, they will have had nearly 18 months of preparation time from the date the syndex rules were first published in the Federal Register, and close to three years from the date we gave notice of our proposal to reinstate these rules. We also note that

local broadcasters have already relied upon the current effective date of the syndex rules, along with the associated notification deadline for pre-existing contracts (which has passed), and that a stay would entail additional costs to these broadcasters in renegotiating contracts and providing further notices once an effective date of the rules is reset.[4]

12. *The Public Interest.* We reject Joint Petitioners' public interest arguments for several reasons. First, we are not convinced that program deletion will be so severe that "massive blackouts of cable television channels" will occur. *See* Joint Petition at 14. As we explained in the *Memorandum Opinion and Order*, both cable operators and distant signal providers have a variety of options to ensure that the public's viewing of cable television is not unduly disrupted. *See Memorandum Opinion and Order*, 4 FCC Rcd at 2719-21. For example, Petitioners ignore, as the petitioners did in the reconsideration phase of this proceeding, "the record evidence on the wealth of available substitute programming that can be cleared nationally, the alternatives available to a cable operator other than simply deleting a signal, and the option of negotiating for carriage with a local broadcaster who holds exclusive rights (an option available to both cable operators and distant signals)." *Id.* at 2720.

13. Second, as we also observed, "it is important to keep in mind that movement in the direction of deletion of duplicate programming not only broadens the market for new programming, but also reflects the fact that the protected programming is more valuable under exclusive local airing, and that importation of the same programming via distant signal would distort this value, thereby reducing incentives for producing more responsive and diverse programming generally, to the detriment of the public." *Id.* at 2721.[5] Petitioners have not convinced us that we erred when we concluded that the syndex rules will result over the long run in an increase in the production, diversity, responsiveness, quality and distribution of programming, to the benefit of the public. The longer we delay the implementation of syndex, the longer it will take before the market begins to respond more accurately to the public's preferences for programming.

14. Joint Petitioners' third public interest argument -- that the syndex rules will result in violations of the first amendment -- is without merit for the reasons referenced above. Finally, we disagree that the syndex rules will result in changes adverse to the interests of consumers in terms of increased subscriber rates or reduced levels of service. As we have explained, the syndex rules will enable the marketplace to operate more efficiently, resulting, in the long run, in a more accurate reflection of consumer demands. *See Report and Order*, 3 FCC Rcd at 5309; *Memorandum Opinion and Order*, 4 FCC Rcd at 2722-23.

15. In view of Joint Petitioners' failure, as discussed above, to satisfy the four-prong test required for injunctive relief, we do not find good cause for granting a stay. Petitioners' request is, therefore, denied.

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended, that Joint Petitioners' Request for Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In an alternative characterization, the *Holiday Tours* court indicated that when little if any harm will befall other interested persons or the public and when denial of the stay would inflict irreparable injury on the movant, a stay is appropriate if the movant has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation. *Holiday Tours*, 559 F.2d at 844.

[2] Moreover, the opponents of the stay have cast sufficient doubt on the need for a number of the equipment components cited by Petitioners, and Petitioners have failed to explain the need for these components. *See, e.g.*, NAB/INTV Opposition at 19-20.

[3] We also note that the court may very well rule on Petitioners' appeal before they would have a need to provide notification to cable subscribers.

[4] We also agree with NAB/INTV and Meredith that the timing of Petitioners' stay request -- which was filed over three months after the Commission released its *Memorandum Opinion and Order* -- militates against a grant of the request; if we were inclined to grant a stay, a more timely stay request would have reduced the harm to other parties by saving local broadcasters the costs of renegotiating syndex rights and providing additional notifications to cable operators.

[5] We also observe that if a cable system does ultimately decide to cease carrying a distant signal because too many of that signal's programs are duplicates of programs broadcast by a local station, the cable system will likely carry programming from an alternative source that offers an entirely new array of viewing fare.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TPI TRANSMISSION
SERVICES, INC.,
Complainant,

v. File No. E-88-39

PUERTO RICO
TELEPHONE COMPANY,
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1989; Released: August 21, 1989

By the Commission:

1. Before the Commission is an Application for Review filed by TPI Transmission Services, Inc. (TPI) on April 10, 1989. TPI seeks reversal of a March 9, 1989 order of the Common Carrier Bureau (Bureau) which dismissed a complaint TPI filed against the Puerto Rico Telephone Company (PRTC).[1] For the reasons discussed below, we deny TPI's application for review.

2. In its complaint, TPI alleged that PRTC had engaged in unreasonable and discriminatory practices by imposing access and per minute charges on intraisland calls made to TPI's paging and conventional mobile telephone units that differed from similar charges imposed on calls to PRTC's cellular telephone units. TPI alleged disparate treatment between local calls to its paging units and conventional mobile units, on the one hand, and to PRTC's own cellular telephones, on the other hand, and argued that such treatment constituted unlawful discriminatory pricing and predatory practices in violation of sections 201 and 202 of the Communications Act (the Act).[2] Moreover, TPI further alleged that PRTC also had imposed recurring charges for the assignment of numbers to its paging customers in contravention of Commission policy.[3] TPI sought a cease and desist order, imposition of forfeitures, unspecified compensatory damages, and $1 million exemplary damages.[4]

3. In granting PRTC's motion to dismiss the complaint, the Bureau found that TPI had not made a *prima facie* case that the monthly recurring charges at issue were merely for assignment of NXX numbers, as TPI alleged, rather than to compensate PRTC for switching work performed, as PRTC maintained.[5] The Bureau found that TPI had failed to sustain its threshold burden of showing that the charges contravened any provision of the Communications Act or Commission rule or order.[6] Noting our statement that cellular carriers are exchange carriers and generally presumed not to be engaged in interexchange service,[7] the Bureau also concluded that TPI had failed to show that this dispute over intrastate rates of a common carrier implicated any federal interest or warranted this Commission's intervention.[8]

4. In its Application for Review, TPI takes exception with the Bureau's decision that an evidentiary hearing should not be held to determine whether the recurring intrastate tariffed charges in question were necessary to compensate TPI for interconnection services. Disregarding recent decisions of the Supreme Court and the District of Columbia Circuit Court of Appeals relied upon by PRTC,[9] and relying instead on cases antedating such authority, TPI maintains that this Commission has jurisdiction over allegations of discriminatory intrastate carrier rates and practices under both Title II and Title III of the Act.[10] According to TPI, the Bureau erred insofar as it relied on section 2(b) of the Act, 47 U.S.C. § 152(b),[11] in dismissing the complaint for lack of jurisdiction.[12]

5. We have carefully reviewed the Bureau Order and find that the Bureau correctly applied Commission and court precedent in dismissing TPI's complaint. Insofar as TPI alleged unreasonable discrimination with respect to rates for calls within Puerto Rico, the rates TPI challenges are for intrastate common carrier communication services subject to the jurisdiction of the Commonwealth of Puerto Rico. Contrary to TPI's contention, sections 201 and 202 of the Act are concerned with "interstate communication" or "foreign communication" by a "common carrier" as those terms are defined in section 3 of the Act, 47 U.S.C. § 153(e), (f) and (h), respectively, and not with charges and practices relating purely to intrastate carrier services.

6. In the declaratory ruling cited at note 6 of the Bureau Order,[13] we found that we have plenary jurisdiction over the physical interconnections between cellular and landline carriers. Nevertheless, because the costs incurred for the switching of interconnected calls between such carriers can be separated for dual intrastate and interstate regulation, we emphasized that "our jurisdiction is limited to the actual cost of interconnection and assuring that interconnection is provided for *interstate* service." (emphasis supplied, footnote omitted).[14] We also made clear that complaints "regarding intrastate rates should be addressed at the state level"[15] absent a showing that the intrastate component of charges for physical interconnection or other intrastate charges were so high as to effectively preclude interconnection and thus "negate" the federal decision to permit interconnection.[16] Accordingly, while we would entertain a complaint when such a showing was made, the Bureau correctly concluded that TPI here failed to establish a jurisdictional nexus to warrant consideration of its complaint before this Commission.[17]

7. Further, insofar as TPI alleged that PRTC had imposed recurring charges for the assignment of NXX codes, we find no reason to disturb the Bureau's conclusion that TPI failed to sustain its burden of demonstrating that the subject recurring charges are not needed to compensate PRTC for actual work performed and that TPI failed to make a *prima facie* case in support of such allegations.

8. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. § 1.115(g), that the Application for Review filed by TPI Transmission Services, Inc. on April 10, 1989, IS DENIED.

9. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] TPI Transmission Services, Inc. v. Puerto Rico Telephone Co., 4 FCC Rcd 2246 (1989) (Bureau Order). Also before us is PRTC's Opposition to Application for Review, timely filed on April 25, 1989. TPI did not file a reply.

[2] 47 U.S.C. § 201 proscribes any unjust or unreasonable charge, practice, classification, or regulation for an in connection with interstate or foreign communication by a common carrier. 47 U.S.C. § 202(a) makes it unlawful for any carrier engaged in interstate or foreign communication by wire or radio:

> to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[3] TPI's complaint originally joined the Puerto Rico Communications Authority (PRCA) as a defendant. However, after PRCA filed a motion to dismiss and an answer to TPI's complaint, TPI itself filed a motion to dismiss which was granted by the Bureau insofar as it had been directed against PRCA. TPI Transmission Services, Inc. v. Puerto Rico Telephone Company, 3 FCC Rcd 1829 (1988). A third count to the complaint, concerning imposition of certain alleged overcharges, was also dismissed at TPI's request. *Id.*

[4] Contrary to TPI's assertion (see Application for Review at n.14), Johnson v. Southwestern Bell Telephone Co., 16 Rad. Reg. 2d (P&F) 941 (1969) does not stand for the principle that the Commission has the authority to award punitive damages.

[5] Bureau Order at 2246-47.

[6] *Id.* at 2247.

[7] *Id.* at 2248 n.18, *citing* MTS/WATS Market Structure, 97 FCC 2d 834, 882 (1984).

[8] *Id.* at 2247, *citing* MTS/WATS Market Structure, 97 FCC 2d 834, 882 (1984) *aff'd in relevant part sub nom.* Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[9] *See* Bureau Order at 2247 n.6, *citing* Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) and California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986).

[10] Application for Review at 8.

[11] 47 U.S.C. § 152(b) provides, in pertinent part, as follows:

> . . . subject to the provisions of section 301 . . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

[12] Application for Review at 8. TPI also appears to mischaracterize dicta in the Bureau Order to the effect that TPI had failed to show that services provided by PRTC to interconnect cellular, mobile and paging calls were "like" services within the meaning of section 202(a) of the Act. Contrary to TPI's assertion, the Bureau did not fault it for not showing that "paging, conventional mobile and cellular were 'like services'". *Id.* at 9. What the Bureau stated in this regard was that:

> [e]ven if TPI had shown that interstate services were involved, which it has not, it failed to show that its *interconnection functions and service for* cellular, mobile and paging in Puerto Rico are "like services" or that any differences in PRTC's charges for interconnecting those services were "unjust or unreasonable" or undue or unreasonable" within the meaning of section 202(a) of the Act. (emphasis added)
>
> Bureau Order, 4 FCC Rcd at 2247.

[13] The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 R.R 2d 1275 (1986), *petition for clarification granted in part*, 2 FCC Rcd 2910 (1987), *reconsidered and request for clarification granted in part*, 4 FCC Rcd 2369 (1989).

[14] *Id.* at 2912.

[15] *Id.* at n.26.

[16] *Id.* at 2912.

[17] *Cf.* Louisiana Public Service Commission, *supra;* California v. FCC, *supra;* NARUC v. FCC, No. 86-1678, slip op. (D.C. Cir. July 7, 1989).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 21, 1989

COMMISSION TO HOLD SATELLITE COORDINATION SEMINAR ON 6-7 SEPTEMBER 1989

Commission staff will present a two-day Satellite Coordination Seminar from 9:00 a.m. to 5:00 p.m. on September 6 and 7, 1989 in room 856, 1919 M Street, N.W., Washington, D.C. The purpose of the seminar is to acquaint current or potential satellite licensees with their obligations regarding satellite coordination under the ITU Radio Regulations and satellite consultation under Article XIV of the INTELSAT Agreement and Article 8 of the INMARSAT Convention.

More than nine months ago, the Commission adopted the 1988 Orbit Assignment Plan and, in separate orders, authorized the construction and launch of new and replacement domestic satellites. In the authorizations, the Commission required, among other things, the licensees to prepare the necessary submissions to the ITU for advance publication, international coordination and notification of these newly authorized space stations in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement.

The Commission is aware of the complexity of these international obligations and is also concerned about the potential delay in the completion of these requirements. Without completion of these obligations in a timely fashion, U.S. domestic and international satellites will not have proper international protection and recognition.

The purpose of this seminar therefore is to brief representatives of the licensees of the detailed requirements of the coordination process to ensure that the satellite networks will be properly advance published, coordinated, notified and protected by application of the relevant provisions of the ITU regulations, INTELSAT Agreement and INMARSAT Convention. The session not only will show how to prepare the information for IFRB and other publications but also will include topics related to the staff's experiences in international coordinations with other countries (e.g., Canada, Brazil, Mexico), INTELSAT and INMARSAT.

The Commission believes this seminar will be both informative and useful in assisting licensees to initiate and to successfully complete their international obligations.

If you would like to attend the seminar please contact Thomas S. Tycz at (202) 632-1860 or Joel Pearlman at (202) 632-3214 by August 30, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PIERCE KENNEDY HEARTH
Complainant,

v. File No. E-89-137

AT&T COMMUNICATIONS,
INC.
Defendant.

ORDER

Adopted: August 4, 1989; Released: August 21, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 5, 1989, defendant AT&T Communications, Inc. ("AT&T") filed a motion, pursuant to Section 1.730 of the Commission's Rules, for permission to serve on Complainant a request for production of documents. The documents sought by AT&T relate to Complainant's claim that AT&T deliberately delayed responding to Complainant's reports that it was having trouble with its 800 service, and that as a result, Complainant lost business worth $1,500,000. Pierce Kennedy Hearth (PKH) filed an opposition on July 18, 1989.

2. The documents sought by AT&T are directly relevant to matters placed in issue by Complainant, and while PKH has opposed this motion on the ground that it is untimely, it proferred no countervailing reason why the document discovery sought by AT&T should not be permitted. We find that AT&T has shown that good cause exists for its document request. *See* 47 C.F.R. § 1.730.

3. While Complainant has opposed the instant motion on the grounds that it is untimely, the likelihood of additional discovery was expressly discussed in two status conferences held pursuant to our rules.[1] Our rules provide that interrogatories normally will be filed during the time period beginning with the date the complaint is filed and ending 30 days after the date a reply is due. 47 C.F.R. § 1.730. Further, they provide that parties may file for other forms of discovery, such as the production of documents, upon a showing of good cause within the period set forth in the rules and, if such discovery could not have been pursued with due diligence, outside this period. We find, that the interests of justice would be served by granting the subject motion and that the defendant has shown due diligence through its cooperation in the two status conferences; the Complainant specifically agreed orally to a staged process of discovery, in which Complainant would serve its interrogatories and request for the production of documents, and upon responding to the same, Defendant would propound its discovery request. Now it appears that Complainant wishes to interpose a technical objection to a staged process of managing the discovery schedule promulgated by the Enforcement Division, a position which we must reject. *See e.g.*, 47 C.F.R. § 1.732(5).

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that AT&T's motion for permission to serve a document request is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] The most recent session was held on June 19, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 21, 1989

TREATMENT OF *EX PARTE*
CONTACTS IN PROCEEDINGS CONCERNING
SHARED NETWORK FACILITIES AGREEMENTS
SUPPLEMENTAL SERVICE LIST

Pursuant to Public Notice, DA 89-289, released July 14, 1989, all of the various formal and informal complaints and tariff investigations involving shared network facility agreements (SNFAs) were designated as restricted proceedings for purposes of Commission Rules governing *ex parte* contacts. As stated in the Notice, any written presentations in CC Docket No. 85-166, Phase I, tariff investigation, the formal complaints listed in Appendix A of the Notice, or the informal complaints listed in Appendix B of the Notice must be served on all parties of record in CC Docket No. 85-166 and all parties to any formal complaints and informal complaints listed in Appendix C of the Notice. The Notice further provided that service would be required on all parties to any substantively related complaints that may in the future be filed.

In accordance with the Notice, we hereby amend the service list contained in Appendix C of the Notice to include the following parties:

Russell M. Blau, Esquire
Andrew D. Lipman, Esquire
Swidler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-3841
(**Add**: One Call Communications, Inc.; LDDS Communications, Inc.)

TCS Network Services
220 Montgomery Street
San Francisco, California 94104

As stated in the earlier Notice, this action is taken pursuant to Section 1.1200(a) of the Commission's Rules, 47 C.F.R. Section 1.200(a), which permits the Commission, in its discretion, to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires.

For further information, contact Thomas J. Beers at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. Nos. 1 and 2 — Transmittal No. 1660

ORDER

Adopted: July 7, 1989; Released: July 10, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On June 27, 1989, AT&T Communications (AT&T) filed the captioned tariff revisions by which it proposes to give a credit of $7500 for each DS1 access facility ordered for use with AT&T Megacom or Megacom 800 Service. The captioned tariff revisions were originally scheduled to become effective July 2, 1989 on five days' notice. AT&T subsequently deferred the effective date to July 11, 1989.[1] AT&T states that the proposed promotion is designed to attract new customers to AT&T Megacom and Megacom 800 Service or to encourage existing customers to expand their usage of these services. AT&T Tr. No. 1660 Description and Justification (D&J) at 2.

2. On June 29, 1989, US Sprint Communications Corporation Limited Partnership (US Sprint) and MCI Telecommunications Corporation (MCI) filed petitions to reject, or to suspend and investigate, AT&T's proposed tariff revisions. On July 5, 1989, AT&T filed a reply to these petitions. US Sprint asserts that the captioned filing fails to satisfy the requirements of the Commission's recently adopted system of incentive regulation of AT&T.[2] US Sprint asserts that the proposed promotion is a surrogate for a promotional offering that this Bureau recently rejected as patently unlawful. US Sprint Petition at 2.[3] In addition, US Sprint argues that our waiver of Sections 61.49 and 61.58 of the Commission's Rules, 47 C.F.R. §§ 61.49, 61.58, was ill-advised. *Id.* at 4-7. Finally, US Sprint contends that the cost and demand data submitted by AT&T are deficient. *Id.* at 7-9.

3. MCI in its petition claims that AT&T is proposing a promotion that not only abuses the Commission's special permission tariff filing processes, but is impermissible under the Commission's price cap regime, which requires AT&T to file its promotions on 45 days' notice. It states that the adoption of price cap rules for AT&T involved the balancing of a number of conflicting interests and concerns that resulted in significant compromises. MCI further claims that AT&T has not shown why adherence to the new rules would not serve the public interest, nor has it shown that its compliance with the rules will create any unnecessary burden.

4. In its reply, AT&T states that the only claims raised by the petitioners which are relevant to the tariff revisions simply restate conclusory arguments about the sufficiency of AT&T's demand and financial data. AT&T insists that petitioners' objections to AT&T's demand and cost analyses are incorrect, and fail to meet the stringent legal standards required to suspend or reject a tariff.

5. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petitions to reject or alternatively to suspend and investigate the captioned transmittal filed by US Sprint Communications Corporation Limited Partnership and MCI Telecommunications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T requested waiver of Sections 61.49, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.49, 61.58, 61.59, to permit, *inter alia*, the captioned filing to become effective on less than 45 days' notice. The Tariff Division granted AT&T's application for special permission and assigned Special Permission No. 89-440.

[2] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989).

[3] *See* AT&T Communications, Tr. No. 1568, DA 89-622, released June 8, 1989 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION
Tariff F.C.C. No. 260

Transmittal No. 8730

ORDER

Adopted: July 27, 1989; **Released: July 28, 1989**

By the Deputy Chief, Common Carrier Bureau:

1. On July 19, 1989, Churchill Communications Corporation (Churchill) filed a motion for an extension of time for filing a petition against Western Union Corporation's (Western Union) Transmittal No. 8730.[1] That request for extension of time until July 25, 1989, was granted by an Order released by the Bureau on July 21, 1989.[2] On that same date, Churchill filed a further motion for extension of time for filing a petition against Transmittal No. 8730. Western Union does not oppose this further extension.

2. Churchill contends that "good faith" negotiations, in which it is presently engaged with Western Union, will eliminate any need for Churchill to challenge the proposed tariff changes, if successful. Churchill Motion at 2. Churchill asserts that a grant of its further motion for an extension of time could result in successfully concluding negotiations, thereby avoiding a dispute before the Commission. *Id.*

3. The Common Carrier Bureau has reviewed Churchill's further motion and concluded that a grant of this request would not serve the public interest. As noted above, Churchill has already been granted one extension of time to protest Transmittal 8730. It has failed to demonstrate good cause for a further extension of the filing deadline.

4. Accordingly, IT IS ORDERED that the further motion for extension of time filed by Churchill Communications Corporation with regard to the above-captioned transmittal IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Western Union Corporation, Tariff F.C.C. No. 260, Transmittal No. 8730, filed July 14, 1989.

[2] Order, Western Union Corporation, Tariff F.C.C. No. 260, Transmittal No. 8730, rel. July 21, 1989, DA 89-849 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, AND PACIFIC NORTHWEST BELL TELEPHONE COMPANY — Transmittal No. 253

US WEST COMMUNICATIONS — Transmittal No. 4
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: August 2, 1989; Released: August 3, 1989

By the Chief, Common Carrier Bureau:

1. On May 17, 1989, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) filed Transmittal No. 253, which proposes to make textual modifications to the terms and conditions regarding its Carrier Common Line (CCL) and end user charges. Specifically, US West proposes in Transmittal 253 to: (1) delete a reference to the exemption for enhanced service providers (ESPs) contained in the paragraph title and text of Section 3.5.3; (2) revise Section 3.2.3 to exclude Feature Group B (FGB) from CCL rates in cases in which FGB lines from non-equal access offices without measurement capabilities are used to originate switched service for WATS or to terminate WATS; and (3) add Section 3.5.4 as a corollary to Section 3.2.3 for the purpose of summarizing the language of Section 3.2.3. US West Tr. No. 253, Description & Justification at 1-3. On June 1, 1989, MCI Communications Corporation (MCI) filed a petition to reject Transmittal 253,[1] to which US West replied on June 12, 1989.[2] Transmittal 253 is scheduled to become effective on August 4, 1989.

2. MCI asserts that US West's proposal to eliminate the ESP exemption language conflicts with Section 61.55 of the Commission's Rules, 47 C.F.R. § 61.55, requiring that tariff provisions be stated clearly and definitely, and would allow US West to interpret the exemption to its advantage. MCI Petition at 3. MCI contends that the proposed changes to Section 3.2.3, WATS access, would allow US West to apply CCL charges to WATS access lines when they are used to access unmeasured Feature Group A (FGA) lines, thereby violating Commission policy. MCI submits that since US West has not proposed to revise the language in the special access portion of its tariff to exclude FGA lines from assessment of special access charges, US West would be able to recover the cost of connecting the WATS subscriber to US West's WATS screening office through both the CCL and special access channel termination rate elements. *Id.* at 4.

3. In response, US West argues that it is unnecessary to specify parties to which a tariff does not apply, *i.e.*, the CCL portion of its tariff and ESPs, and disputes MCI's allegation that the proposed deletion of the ESP exemption language is an attempt to evade Commission rules or policy. US West Reply at 2-3. According to US West, other tariffs currently on file with the Commission provide for assessment of CCL charges for WATS lines accessing FGA or FGB services which are ordered from non-equal access offices with no measurement capabilities. *Id.* at 4 n.9. US West notes that it proposes to delete the reference to FGB in Section 3.2.3 because it now has the capability to measure FGB minutes. *Id.* at 4-5 n.10. In addition, US West contends that since all WATS access line minutes of use are subtracted from the FGA minutes billed no double recovery can occur. *Id.* at 6.

4. On July 27, 1989, US West filed Transmittal No. 4,[3] which proposes to reinstate the ESP exemption language in Section 3.5.3, and to eliminate proposed Section 3.5.4 since that section merely duplicates Section 3.2.3. US West Tr. No. 4, Cover Letter at 1.

5. The Common Carrier Bureau has reviewed Transmittal 253, the description and justification supporting it, the pleadings, and Transmittal 4. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by US West are patently unlawful so as to require rejection.

6. Accordingly, IT IS ORDERED that the petition to reject Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 253, filed by MCI Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Reject (MCI Petition), filed June 1, 1989.

[2] US West Reply, filed June 12, 1989 (US West Reply).

[3] On July 25, 1989, the Tariff Division granted US West's request for special permission to file Transmittal No. 4 with an effective date of August 4, 1989, and assigned Special Permission No. 89-574.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-298

In re Applications of

ARMANDO GARCIA File No. BPH-840629IA

REIMER BROADCASTING LIMITED File No. BPH-840629II

For Construction Permit
for a New FM Station at
Guadalupe, California

ORDER

Adopted: August 7, 1989; Released: August 8, 1989

1. Before the Commission for consideration is a Joint Request for Approval of Settlement Agreement filed July 20, 1989 and supplemented July 24, 1989 by Armando Garcia and Reimer Broadcasting Limited; and Comments in Support of the Joint Request filed July 26, 1989 by the Mass Media Bureau.

2. In an Order, *Armando Garcia*, 3 FCC Rcd 4767 (1988), the Commission denied review of a Review Board Decision, *Armando Garcia*, 3 FCC Rcd 1065 (Rev. Bd. 1988), granting Garcia's application. Reimer appealed the grant of Garcia's application. At the request of the parties, the Court of Appeals remanded this proceeding to the Commission for consideration of the Joint Request. *Reimer Broadcasting Limited v. FCC*, Case No. 88-1659 (D.C. Cir. July 14, 1989).

3. Under the terms of the agreement, Garcia and Reimer agree to the dismissal of Reimer's application with prejudice, and the grant of Garcia's application. In consideration therefor, Garcia will pay Reimer $15,000.

4. The Joint Request fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3535(a) that govern settlement agreements. Attached to the Joint Request are a copy of the agreement between Garcia and Reimer, and certifications from Garcia and Reimer that their applications were not filed for the purpose of carrying out a settlement agreement. The agreement will serve the public interest by terminating this proceeding and expediting the institution of a first local transmission service in Guadalupe, California.

5. ACCORDINGLY, IT IS ORDERED, That pursuant to authority delegated under 47 C.F.R. § 0.251(f)(11), the Joint Request for Approval of Settlement Agreement filed July 20, 1989 and supplemented July 24, 1989 by Armando Garcia and Reimer Broadcasting Limited IS GRANTED; that the attached agreement IS APPROVED; that the application filed by Reimer Broadcasting Limited (File No. BPH-840629II) IS DISMISSED; and that the application filed by Armando Garcia (File No. BPH-840629IA) IS GRANTED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Diane S. Killory
General Counsel

By John I. Riffer
Associate General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Giraud Chester and Marjorie F. Chester, d/b/a CHESTER ASSOCIATES
East Hampton, New York

MM DOCKET NO. 84-525
File No. BPH-830318AC

JOHN F. SHEA, III
East Hampton, New York

MM DOCKET NO. 84-526
File No. BPH-830321AL

For Construction Permit for a New FM Station

ORDER

Adopted: August 7, 1989; Released: August 8, 1989

1. In a Decision, 2 FCC Rcd 2029 (1987), the Review Board granted the application of Chester Associates and denied the application of John F. Shea, III. Shea filed an application for review of that Decision and Chester Associates filed an opposition. Now before the Commission for consideration is a Joint Request for Approval of Settlement Agreement, and a Settlement Agreement, filed July 14, 1989 by Chester Associates and Shea.

2. The Joint Petition seeks approval of the settlement agreement; grant of Chester Associates' application; and the dismissal of Shea's application. In consideration therefor, Chester Associates will pay Shea $100,000.

3. The agreement of the parties fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. §73.3525(a) governing settlement agreements. Chester Associates and Shea have certified that their applications were not filed for the purpose of reaching or carrying out a settlement agreement. The agreement will serve the public interest by expediting the institution of a new FM radio service in East Hampton, New York.

4. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.251(f)(11), That the Joint Request for Approval of Settlement Agreement filed July 14, 1989 by Chester Associates and John F. Shea, III IS GRANTED; that the attached Settlement Agreement IS APPROVED; that the application filed by Chester Associates (File No. BPH-830318AC) IS GRANTED; and that the application filed by John F. Shea, III (File No. BPH-830321AL) IS DISMISSED.

5. IT IS FURTHER ORDERED, That the Application for Review filed June 5, 1987 by John F. Shea, III IS DISMISSED as moot.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Diane S. Killory
General Counsel

By John I. Riffer
Associate General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-7

In the Matter of

Amendment of Section 73.3555
of the Commission's Broadcast
Multiple Ownership Rules

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1989; Released: August 4, 1989

By the Commission: Commissioner Diaz Dennis concurring in part and dissenting in part, and issuing a separate statement.

1. Before the Commission are a Petition for Partial Reconsideration filed by Great American Television and Radio Co., Inc. ("Great American") and a Petition for Reconsideration or Clarification filed by Holston Valley Broadcasting Corp. ("Holston"). Both petitioners seek reconsideration of the Commission's *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), in which the Commission adopted new policies regarding waiver of its prohibition against the common ownership of radio and television stations in the same television market.

2. As will be discussed in more detail below, under the revised one-to-a-market waiver policy the Commission decided to look favorably upon waiver applications involving radio and television station combinations in the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination. 4 FCC Rcd at 1741. It also announced that it will look with favor upon waiver requests for proposed combinations involving at least one "failed" station – *i.e.*, a station that has not been operational for a substantial period of time or that is involved in bankruptcy proceedings. *Id.* Finally, the Commission stated that for parties not meeting either of the two specific waiver criteria, it will consider waiver applications on a more rigorous case-by-case basis to determine if the proposed combination serves the public interest, based upon an evaluation and balancing of other specific factors, including the types of facilities involved, the number of stations already owned by the applicant, the financial difficulties of the station(s), and the nature of the market in light of diversity and competition concerns. *Id.* at 1753. The Commission stated, however, that no waiver applications would be granted if the proposed combination will result in any one entity holding an attributable interest in more than one AM and one FM radio station in any market where it also owns a television station. *Id.* at 1741.

3. Great American seeks reconsideration of the Commission's determination that, in the absence of a "failed" station situation, it would look favorably upon waivers of the one-to-a-market rule only in the top 25 markets where there are 30 or more voices. It requests that the Commission reevaluate its waiver standard and look with favor upon waivers if there are 30 or more "voices" in a market without regard to market size. Holston requests that the Commission "clarify" that it will entertain waiver requests involving common ownership of a UHF station, an FM station, and more than one AM station. For reasons discussed below, we deny Great American's petition for reconsideration.

BACKGROUND

4. Section 73.3555 of the Commission's Rules restricts the multiple ownership of broadcast stations. On February 20, 1987, the Commission issued a *Notice of Proposed Rule Making* in MM Docket No. 87-7 (*Notice*), 2 FCC Rcd 1138 (1987), which set forth proposals for relaxing certain aspects of the duopoly and one-to-a-market rules. The duopoly rules prohibit the common ownership of two or more commercial stations in the same broadcast service which serve the same local area. The rules accomplish this by prohibiting any individual or entity from having a cognizable ownership interest in two or more radio broadcast stations whose contours overlap or two or more television stations whose Grade B contours overlap. The *Notice* proposed several modifications of the rule as it applies to both commercial AM and FM stations. *Id.* Second, the *Notice* proposed relaxing the "one-to-a-market" rule for radio-television cross-ownership to allow the common ownership of certain radio-television combinations. *Id.*

5. In the *First Report and Order* in MM Docket No. 87-7, (*First Report and Order*), 4 FCC Rcd 1723 (1989), the Commission modified the radio "duopoly" rules which had prohibited common ownership of two or more commercial radio stations in the same broadcast service in the same geographic area, *e.g.*, two AM or two FM stations whose 1 mV/m contours overlap. Under the modified radio duopoly rules, the Commission redefined the "principal city contour," the area where the majority of a station's listeners are located. Thus, under the revised rules, common ownership of two or more commercial stations in the same broadcast service is prohibited if their principal city contours overlap – *i.e.*, a 5 mV/m contour for AM stations and a 3.16 mV/m contour for FM stations. Although the new rules continue to prohibit common ownership of two AM or two FM stations in the same community of license, they now permit dual ownership in some cases within the same ADI market.[1]

6. The Commission's *Second Report and Order*, 4 FCC Rcd 1741 (1989), adopted shortly thereafter, revised the waiver policy under the one-to-a-market rule. The rule prohibits the common ownership of commercial radio and television stations in the same market if the 2 mV/m groundwave contour of an AM station or the 1 mV/m contour of an FM station encompassed the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station. 4 FCC Rcd at 1742. In revising the one-to-a-market waiver policy, the Commission determined, first, that it would look favorably upon waiver applications involving radio and television station combinations in the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination, as determined by counting television

licensees in the relevant ADI television market, and radio licensees in the relevant television metropolitan market. 4 FCC Rcd at 1741. Second, the Commission decided that it would also look favorably upon waiver requests involving ownership of "failed" stations that have not been operational for a substantial period of time (*e.g.*, four months) or stations that are involved in bankruptcy proceedings. *Id.*[2] Third, the Commission stated that it would consider other waiver applications on a more rigorous case-by-case basis to determine if the proposed combination serves the public interest based on an evaluation and balancing of other specific factors, including the types of facilities involved, the number of stations already owned by the applicant, the financial difficulties of the station(s), and the nature of the market in light of diversity and competition concerns. *Id.* Fourth, the Commission stressed that no waiver application will be granted if the proposed combination would result in any one entity holding an attributable interest in more than one AM and one FM radio station in a market in which it also owns a television station. *Id.*

DISCUSSION

Great American Television and Radio Co., Inc. (*"Great American"*)

7. *Petition for Partial Reconsideration.* On April 3, 1989, a Petition for Partial Reconsideration was filed by Great American seeking reconsideration of the Commission's determination that it would look favorably upon waivers of the one-to-a-market rule only in the top 25 markets where there are 30 or more voices. Great American requests that the Commission reevaluate its waiver standard and look with favor upon waivers if there are 30 or more voices in a market without regard to market size. Great American is the licensee of stations in both Cincinnati (29th market) and Kansas City (28th market). Both markets fall below the top 25 but each has 30 or more voices. Great American states that its common ownership of stations in those markets was permitted under the grandfathering provision of Note 4 of Section 73.3555, but that this provision no longer applies to Great American's properties following a transfer of control of the company in October, 1987.[3] A waiver of the rule is now necessary in order to permit continued ownership of Great American's stations. Great American indicates that it filed such a waiver petition on March 10, 1989. Pet. at 2. Great American contends that there is no rational basis for the top 25 market test established in the *Second Report and Order* and that none of the commenters supported a top 25 market cut-off in conjunction with a standard based on the actual number of stations in a given market. Pet. at ii, 5-6. Therefore, Great American requests that the Commission eliminate that portion of the test for a waiver and retain only the requirement of 30 or more voices. Pet. at 11.

8. *Comments.* King Broadcasting Co. ("King"), licensee of radio and television stations that include KGW-AM, KINK-FM and KGW-TV in Portland, Oregon (27th market), filed comments in support of Great American's Petition for Partial Reconsideration.[4] First, King requests that the Commission eliminate the television ADI market rank test as a requirement for a waiver and retain only the requirement that there be at least 30 separately owned broadcast "voices" in the market in which waiver is sought. King at 2. Second, King alleges that the Commission did not address the question of divestiture of existing commonly held stations, and that the Commission should clarify that it explicitly exempts combinations, existing at the commencement of the proceeding, in markets where there are 30 or more voices. King at 3. King argues that such an exception would allow existing diversity to be maintained and the continuity of operations without unnecessary disruption to the industry. King at 3.

9. The Consumer Federation of America and Telecommunications Research and Action Center ("CFA/TRAC") opposes Great American's petition for partial reconsideration of the *Second Report and Order* on the grounds that there is "no independent policy basis" for the Commission to look favorably on waivers of the one-to-a-market rule for stations located in markets ranked below Arbitron's top 25 television ADIs, even if those markets have 30 or more independently owned broadcast voices. CFA/TRAC argues that since the number of television stations in a market is relatively the same below the very largest markets, the correlative power of television increases as market size diminishes. Thus, the top 25 market standard recognizes, according to CFA/TRAC, that the few television voices in a market with fewer people provides undue opportunity for abuse by dominant television stations no matter how many radio voices there may be. CFA/TRAC at 6. CFA/TRAC further argues that the Commission's decision to look favorably upon waivers in the top 25 markets with 30 voices has a basis in longstanding Commission policy and that like many Commission ownership policies, it is a prophylactic rule which guards against undue concentration of control in medium and small sized television markets. CFA/TRAC at 4. Thus, CFA/TRAC contends that the top 25 market standard is rooted both in the Commission's expert judgment and longstanding broadcast policy.[5] CFA/TRAC at 7. CFA/TRAC maintains that Great American has not demonstrated how eliminating the top 25 market standard would serve the public interest. *Id.* CFA/TRAC adds that nothing in Great American's petition establishes error in the Commission's broad discretion to establish stricter waiver standards, requiring a higher demonstration of public interest benefits, for combinations below the top 25 markets. CFA/TRAC at 6-7. Finally, CFA/TRAC adds that Great American is not foreclosed from seeking a case-by-case waiver of the rule by making the more particularized public interest showings required of proposed combinations falling below the top 25 markets.

10. *Analysis.* We are unable to agree with Great American that the use of a top 25 markets/30 voices test is an inappropriate means of addressing the nature of the waiver process and the burdens and expectations concerning the required showings that parties will need in order to comply with it. Based on the Rule Making record, we have concluded that the Commission should be more receptive to waiver requests involving stations in the larger markets. Parties outside the larger markets may also seek waivers but must demonstrate with specificity the type of public interest factors that we are generally presuming to be present in the larger markets where there are at least 30 independently owned, operated and controlled voices. Where, however, the market and public interest factors are specifically shown to warrant a waiver, it will be granted. Thus, we do not anticipate results in which parties in fact similarly situated are treated dif-

ferently in the "arbitrary and capricious" fashion Great American has suggested. Nor do we agree that, in structuring the waiver policy as we have, an unlawful or arbitrary dividing line has been established.

11. Contrary to Great American's contention, the Commission carefully considered what should be the appropriate market size cut-off for the waiver policy. As a result of those deliberations, the Commission determined that the public interest required the imposition of different waiver policies in situations below the top 25 markets was the most prudent course in balancing its traditional public interest concerns for competition and diversity against the public interest benefits resulting from combined station operations. *Id.* at 1751-2. The Commission adopted the top 25 market cut-off "out of an abundance of caution," after determining that a "careful approach" was the most reasonable waiver policy in connection with the radio-TV cross-ownership rules. *Id.* at 1751. Emphasizing that its new waiver policy was not an abandonment of traditional concerns for encouraging diversity of voices and economic competition, the Commission stated that the limited waiver policy would enable both the public and broadcasters to benefit from joint ownership, while providing a safety net by retaining the current rule. *Id.* at 1748, 1752.

12. In the course of arriving at its decision to retain the current rule while relaxing its waiver policy, the Commission gave careful consideration to the other options suggested by commenters, including: (1) eliminating the radio/TV cross-ownership rules completely in all markets; (2) partially eliminating this rule for AM-TV combinations; (3) partially eliminating the rule in large markets; or (4) keeping the rule in its present form. 4 FCC Rcd at 1750. While many commenters supported the option to eliminate the rule entirely, the Commission decided, in the interest of caution, not to eliminate the rule, but to adopt a new waiver policy in order to assess the effects of relaxing the one-to-a-market policy. *Id.*[6] A second option the Commission considered was to permit AM-VHF, AM-UHF, and AM-FM-UHF combinations in all television markets or, alternatively, to permit these combinations only in large markets and to entertain requests for such combinations in other markets on a case-by-case basis. However, the Commission determined that the record did not provide a basis for concluding that it would be desirable to adopt this option. *Id.*

13. A third option considered, supported by a large group of commenters, was to eliminate the cross-ownership rule only in large markets, such as the top 20, 50, or 100 markets, and to allow radio-TV combinations on a case-by-case basis in all other markets. 4 FCC Rcd at 1750. However, the Commission determined it would be preferable to review proposed radio-TV combinations on a case-by-case basis, even in large markets, in order to have a period of time in which to assess the ramifications of relaxing the radio-TV cross-ownership rules. *Id.*

14. The argument has been made that the top 25 market cut-off should be eliminated as irrelevant or redundant with the 30 voices standard. We do not disagree, in the abstract, with the basic proposition that the number of voices present in a market provides a more direct measure of competition and diversity than the size of the market involved. The top 25 market standard has additional advantages, however, in terms of channeling the waiver process. As noted earlier,[7] a number of commenters in the proceeding specifically proposed that we use a market size cut-off point in determining where to allow radio-TV combinations. We have used similar market size standards in a number of our broadcast rules -- *e.g., Top 50 Policy*. The Commission believed, based upon review of the comments in this proceeding, that according favorable treatment to radio-TV combinations in the very largest or top 25 markets would not significantly undermine diversity and competition concerns yet would allow the public and broadcasters to realize the benefits of common ownership. *Id.* Thus, by evaluating waiver applications, with particular receptivity to applications involving stations in the top 25 television markets, as well as situations which involve "failed" stations, the Commission would be able to assess the effects of relaxing the one-to-a-market policy. *Id.* at 1750.

15. The Commission further determined that there is a correlation between market rank and the number of stations or station owners. It found that the largest markets tend to have the largest number of separate owners, whereas smaller markets tend to have fewer radio and TV stations and fewer distinct owners. 4 FCC Rcd at 1751. Although the Commission did not believe it plausible or likely, it considered the possibility that in a large market which presently contains more than 30 licensees, a series of mergers and bankruptcies might reduce the total number of voices to 30 or below. *Id.* To guard against that possibility, and thus ensure that the Commission's general diversity goals are not compromised, the Commission included the 30 voices requirement, in addition to the top 25 market standard, as a prerequisite to favorable consideration of proposed TV-radio combinations. *Id.*

16. The Commission carefully considered many options, including those proposed by the commenters in this proceeding, before it decided to adopt the top 25 market/30 voices cut-off. This consideration included whether to expand the cut-off to include more markets or whether to have a market cut-off at all. Great American's petition has not persuaded us that the decision was incorrect. Therefore, reconsideration is not warranted, and we deny its petition.

17. We wish to emphasize, however, that as CFA/TRAC notes, parties are not foreclosed from seeking individual waivers in cases that propose combinations in markets below the top 25. Such petitions require more information and entail greater analysis on our part than those submitted pursuant to our top 25 market procedures but will be considered on a case-by-case basis. The factors that the Commission has indicated may be of relevance include, but are not limited to, the types of facilities involved, the number of stations already owned by the applicant, the financial situation of the station(s), and the nature of the market in light of our diversity and competition concerns. 4 FCC Rcd at 1753-4.

18. Although we have set forth a number of factors relevant to action on these petitions, it should be emphasized that our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved. Not all of the factors mentioned will be relevant in every case. In smaller markets, where competition is usually more limited, of particular importance would be demonstrated financial difficulties and the practical question of whether a waiver grant, by permitting continued viable service from an existing station or the activation of a new

station, would in fact increase or decrease the vigor of competition and diversity in the market. Consistent with the Court's instructions in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), we will endeavor to treat all waiver petitions, both within and outside the top 25 largest markets, that are shown to be factually comparable in a comparable manner.

19. Finally, we wish to respond to King's request that we clarify the "grandfather" provisions of the multiple ownership rules. The grandfather provisions in Section 73.3555, Note 4 were not amended in the *Second Report and Order*. Combinations authorized or previously permitted under the former multiple ownership rules are grandfathered, and therefore not subject to immediate divestiture. Furthermore, the changes made to the multiple ownership provisions in MM Docket No. 87-7 apply *prospectively*, not retroactively. The conditions set forth in Note 4, which terminate the grandfather status of existing combinations, apply to these combinations as well.[8]

***Holston Valley Broadcasting Corp.* ("*Holston*")**

20. *Petition for Reconsideration or Clarification.* On April 3, 1989, Holston filed a Petition for Reconsideration or Clarification. It is the licensee of UHF television station WKPT-TV, Kingsport, Tennessee, AM radio station WKPT, Kingsport, Tennessee, and FM radio Station WTFM, Kingsport, Tennessee. Holston states that it is also the proposed assignee of AM radio station WKTP (formerly WUSJ), Jonesborough, Tennessee.[9] Holston states that Jonesborough is located within the Bristol-Kingsport-Johnson City television market (86th market), and although its market is outside the top 25, there are more than 30 voices in that market. Also, Holston alleges that both of the AM stations, as well as the UHF station, have experienced financial difficulties although the stations do not meet the specific criteria of our new "failed station" waiver standard.[10] Thus, while Holston's assignment application does not meet either of the "top 25 market/30 voices" or "failed station" standards for waiver, Holston claims to meet the substantive concerns underlying those standards and argues that Commission consideration of its waiver is therefore warranted. Pet. at 3.

21. Holston also notes that the Commission stated it would not grant waivers which would "result in any one entity holding an attributable interest in more than one AM and one FM radio station within any single television 'metro' market, as defined by Arbitron Ratings Company." 4 FCC Rcd at 1741. Holston argues that no such restriction was imposed under the "case-by-case" approach of Note 4 in the previous one-to-a-market rule. It therefore requests that the Commission reconsider this part of its decision and explain that it intended to liberalize, not tighten, the standards previously applied in Note 4. Pet. at 4-5. Holston further asks the Commission to "clarify" that it will consider waiver requests where common ownership of a UHF station and more than one AM station is involved. Pet. at 7.

22. *Comments.* CFA/TRAC contends that Holston's requested "clarification" would allow grant of Holston's pending request for assignment of an AM radio station in a "metro market" where it already owns a UHF station, an FM radio station and an AM radio station. CFA/TRAC maintains that Holston, in fact, seeks reconsideration of the multiple ownership rules, rather than a "clarification," because its proposed assignment is unequivocally barred by the Commission's ruling that "it will not grant any application if the proposed combination would result in more than one AM and one FM radio station station within any single television 'metro' market." 4 FCC Rcd at 1741; CFA/TRAC at 2. CFA/TRAC contends that allowing Holston to own a second AM station in a market where it already owns three broadcast properties would provide the Bristol-Kingsport-Johnson City local market with an undue measure of concentration. CFA/TRAC further argues that Holston has failed to justify how the assignment of a second AM station would serve the public interest. Moreover, CFA/TRAC adds, Holston has not demonstrated the proposed benefit to the public interest if the Commission were to allow the extreme concentration resulting from one entity owning two AM stations, an FM station, and a television station in a small market. CFA/TRAC at 2-3.

23. Holston, in reply, argues that it is not "unequivocally barred" by the one-to-a-market rule from owning two AM stations, one FM station, and one UHF station in the same television "metro" market because the Commission has the authority to waive the rule, which ordinarily would preclude such ownership, upon a proper and convincing public interest showing. Reply at 2. Holston contends that it requested a "clarification" to "make clear" that, although the Commission may not anticipate "routinely" waiving a rule, it may do so when circumstances warrant. *Id.* Holston adds that it does not seek a grant of a waiver application in this rule making proceeding, but simply a clarification that the Commission would consider Holston's separate waiver application on its merits in an appropriate proceeding. *Id.*

24. *Analysis.* Holston requests that the Commission clarify that it intended to liberalize, not restrict, its former UHF exception set forth at Note 4 of the previous rules. In this regard, Holston asks the Commission to clarify that the *Second Report and Order* did not intend to foreclose consideration of requests for waiver under case-by-case review involving a UHF station and more than one radio station in the same service. Holston also contends that although it does not qualify for a waiver under the top 25 market/30 voices or "failed station" criteria, the Commission should grant it a waiver if it meets the "substantive policy concerns" underlying those criteria.

25. The Commission stated in the *Second Report and Order* that it would give stricter scrutiny to UHF-radio combinations that did not qualify for the two-part "failed station" waiver policy and which formerly were covered by Note 4 of the multiple ownership rules. 4 FCC Rcd at 1753. In addition, the Commission stated that it will not grant waivers "if the proposed combination would result in any one entity holding an attributable interest in more than one AM and one FM radio station within any single television 'metro' market, as defined by Arbitron Ratings Company." This is set forth in the new Note 7 to Section 73.3555 of the rules promulgated in the *Second Report and Order*. We note that the rules do permit ownership of two or more non-overlapping radio stations in a metro market when a television station is not involved.

26. On reconsideration, we believe that our previous statement, which barred waivers should be modified. A flat prohibition, such as is codified in Note 7, could preclude the Commission from evaluating, on a case-by-case basis, even such combinations that clearly could be demonstrated to be uniquely in the public interest. Indeed, it is axiomatic that the Commission cannot com-

pletely foreclose consideration of waiver petitions.[11] A prohibition foreclosing the exercise of our discretion and expert judgment to assess the costs and benefits of combinations in the same market involving a television station and more than one radio station in the same service is detrimental to the public interest. Consequently, we will amend Note 7 of Section 73.3555 of the Rules, 47 CFR §73.3555, Note 7, to reflect this revised policy, as set forth in the Appendix to this decision. However, we emphasize that we do not foresee approving any combination involving a television station and more than one radio station in the same service unless it clearly can be demonstrated to provide unique public interest benefits. It should further be emphasized that we do not address, and this does not affect in any way, the restrictions in the rules prohibiting the common ownership of AM stations whose 5 mV/m contours overlap or FM stations whose 3.16 mV/m contours overlap. *See First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989).

PROCEDURAL MATTERS

Final Regulatory Flexibility Analysis

27. Pursuant to the Regulatory Flexiblity Act of 1980, 5 U.S.C. §605, we make the following changes to the final regulatory flexibility analysis in the *Second Report and Order*. The rule change will not have a significant impact on a substantial number of small entities because the modification of the rule adopted in the *Second Report and Order* simply permits the Commission to exercise discretion to evaluate waivers of the one-to-a-market rules involving more than one radio station in the same service and a television station in an ADI television metropolitan market.

ORDERING CLAUSES

28. Therefore, IT IS ORDERED, pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, and Section 1.429(i) of the Commission's Rules, That the Petition for Reconsideration filed by Great American Television and Radio Co., Inc., is DENIED. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, and Section 1.429(i) of the Commission's Rules, That the Petition for Reconsideration and Clarification filed by Holston Valley Broadcasting Corp. is GRANTED to the extent set forth above.

29. IT IS FURTHER ORDERED That Part 73 of the Commission's Rules is AMENDED, as set forth in the Appendix to this *Memorandum Opinion and Order*, effective upon adoption.[12]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 73 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, and 303

2. Section 73.3555 is amended by revising Note 7 to read as follows:

§ 73.3555 Multiple Ownership Rules

* * * * *

Note 7: The Commission will entertain requests to waive the restrictions of paragraph (b) of this section on a case-by-case basis. The Commission will look favorably upon waiver applications that meet either of the following two standards: (1) Those involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees after the proposed combination, as determined by counting television licensees in the relevant ADI television market and radio licensees in the relevant television metropolitan market; or (2) those involving "failed" broadcast stations that have not been operated for a substantial period of time, *e.g.*, four months, or that are involved in bankruptcy proceedings. For the purposes of determining the top 25 ADI television markets, the relevant ADI television market, and the relevant television metropolitan market for each prospective combination, we will use the most recent *Arbitron Ratings Television ADI Market Guide*. We will determine the number of radio stations in the relevant television metropolitan market and the number of television licensees within the relevant ADI television market based on the most recent Commission ownership records. Other waiver requests will be evaluated on a more rigorous case-by-case basis, as set forth in the *Second Report and Order* in MM Docket No. 87-7, FCC 88-407, released February 23, 1989, and *Memorandum Opinion and Order* in MM Docket No. 87-7, FCC 89-256, released August 4, 1989.

FOOTNOTES

[1] The revised rule is set forth at 47 CFR §73.3555(a)(1) and (2).

[2] The Commission also noted that this new waiver approach would replace the radio-UHF exception in Note 4 of Section 73.3555 of the rules. 4 FCC Rcd at 1752. It stated that while the "failed station" rationale was similar to the Note 4 exception under which the Commission had allowed certain radio-UHF combinations, primarily in cases of economic hardship or when joint ownership would result in activation of an unused TV allocation, the "failed station" standard it was adopting in the *Second Report and Order* was more conservative, since only two specific conditions would satisfy this test, and petitions to deny might be able to rebut the waiver request. *Id.* Moreover, the Commission added that these waiver applications would be sub-

ject to much closer scrutiny than had previously been the case under the Note 4 radio-UHF exception to the radio-TV cross-ownership rule. *Id.* at 1753.

[3] In a letter decision to Taft Broadcasting Co. ("Taft"), DA 87-1419, October 2, 1987, the Mass Media Bureau granted applications seeking consent to transfer the broadcast and other interests of Taft to TFBA Limited Partnership. The decision stated that "[w]ith respect to the acquisition of the radio-VHF television combinations in Kansas City and Cincinnati, as well as the overlapping AM stations in Columbus and Cincinnati, the transferee will be afforded a period of 18 months following the consummation of the proposed transaction, or six months after the effective date of the Commission's action in MM Docket No. 87-7, whichever date is later, to come into compliance with the multiple ownership rules as they exist following the conclusion of that rule making proceeding." Upon consummation of the transfer, TFBA Limited Partnership changed its name to Great American Television and Radio Co., Inc.

[4] Nationwide Communications Inc. ("Nationwide"), a licensee of radio and television stations, also filed comments in support of Great American. Nationwide concurs with Great American that the appropriate relevant criterion for determining the extent of broadcast media competition and diversity in a market is the number of separately owned radio and television "voices," without regard to television market ranking. Nationwide at 3.

[5] *See, e.g., Metromedia Radio and Television, Inc.*, 102 FCC 2d 1334, 1339 (1985), *aff'd sub nom. Health and Medicine Policy Research* Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986); *Cap Cities/ABC Inc.*, 59 RR 2d 451 (1985) [granting waiver of duopoly rules].

[6] In addition, it concluded that eliminating the rule entirely was outside the scope of the *Notice*. 4 FCC Rcd at 1759 n.76.

[7] *See Second Report and Order*, 4 FCC Rcd at 1750 (1988).

[8] The "grandfathered" status of ownership interests existing at the time the Commission amends the multiple ownership rules terminates upon Commission approval of a transfer of ownership interest. An exception to this divestiture requirement is provided to permit intrafamilial transfers of ownership interests in a broadcast business to heirs. *See, e.g WKBN Broadcasting Corp.*, 48 RR 2d 1251 (1980); *Summit Communications Inc.*, 48 RR 2d 1237 (1980); Letter to David M. Baltimore, 45 FCC 2d 442 (1974); and *Cecil F. Heftel*, 25 RR 2d 379 (1972), for more detailed discussion of the Note 4 provisions. While we are retaining that portion of the rule that terminates "grandfather" status upon a transfer of ownership, we do not discount the possibility that operation of such facilities over a period of time may be relevant in the context of a waiver petition. In such a situation, actual information on joint operation of the facilities will be available.

[9] Holston indicates that it has an application for assignment pending with respect to the Jonesborough, Tennessee, AM radio facility. (FCC File No. BAL-880711EA).

[10] Holston states the Jonesborough AM station was purchased out of bankruptcy by its present owners and now simulcasts the programming of a commonly-owned FM station.

[11] *See WAIT Radio v. FCC, supra.*

[12] *See* 5 U.S.C. §553(d)(1).

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS
Concurring in part, dissenting in part

In Re: Amendment of Section 73.3555 of the Commission's Broadcast Multiple Ownership Rules.

I continue to believe that diversity of voices is a cornerstone of mass media regulation. With the Commission's *Second Report and Order* in this proceeding, I issued a separate statement proposing an alternative. I would have amended the one-to-a-market rule to allow TV-radio combinations only in markets where there are at least 10 television stations, 45 separate voices, and 65 stations. In all other markets, the Commission should review waivers skeptically and grant them sparingly, if at all. *See* Separate Statement of Commissioner Patricia Diaz Dennis in MM Docket No. 87-7, released April 10, 1989.

To the extent this item reaches conclusions in accord with my proposal, I concur; to the extent it moves in the opposite direction, I must dissent. Therefore, I concur in the decision not to extend the majority's permissive waiver policy beyond the top 25 markets. Great American Television and Radio Co, Inc. ("Great American") asked the Commission to look favorably on TV-radio combinations in all markets with at least 30 voices. Great American is right in arguing that a standard based on the number of voices, rather than market rank, relates more closely to the goal of promoting diversity. Nevertheless, because I believe the top 25 standard is already too permissive, I cannot support an even more lenient policy that would result in our approving more combinations, further weakening diversity.

This item also reexamines our earlier decision to forbid any company from owning a television station plus more than one AM station or more than one FM station within the television station's metro market. I would allow those combinations in any market meeting the 10-45-65 standard mentioned above, provided that the applicant also complied with our duopoly rules. In a large, sprawling market such as Los Angeles, this would allow a company to operate a TV station, plus two AM stations at opposite ends of the market, without coming to the FCC for a waiver. In markets that do not meet the 10-45-65 test, I believe the Commission should not authorize any new radio-TV combinations except in extraordinary circumstances.

Finally, I am concerned about the observation that, in markets below the top 25, the Commission will not expect waiver applicants to comply with all the public interest factors mentioned in the *Second Report and Order*. I hope the Commission will not backtrack from its commitment to scrutinize these applications critically. I would be particularly reluctant to permit combinations where the applicant relied primarily on "financial difficulties" short of the "failed station" standard that would cause the Commission to be predisposed toward granting a waiver. *Second Report and Order*, 4 FCC Rcd 1741, 1752-53 (1989). I agree that "financial difficulties," as defined in the *Second Report and Order*, can contribute to a waiver showing. 4 FCC Rcd 1741, 1753 (1989). Nevertheless, in many cases, stations that incur losses because of interest or depreciation expense are actually capable of generating a healthy profit under new ownership and could easily be sold to a company with no other local broadcast interests. In those

cases, I hope the Commission will not allow private "financial difficulties" to overcome the public interest benefit of diversity.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE COMPANY
Tariff F.C.C. No. 41

Transmittal Nos. 988 and 1001

High Capacity 44.736 Mbps
Intermediate and Super-
Intermediate Hub Multiplexing

ORDER

Adopted: August 9, 1989; **Released: August 11, 1989**

By the Chief, Common Carrier Bureau:

1. On May 15, 1989, New York Telephone Company (NYT) filed the above-captioned transmittal to introduce High Capacity 44.736 Mbps Intermediate and Super-Intermediate Hub Multiplexing as an option to its High Capacity DS3 Special Access service. On May 30, 1989, US Sprint Communications Company Limited Partnership (US Sprint) filed a petition for partial rejection or, in the alternative, partial suspension and investigation. NYT filed a reply on June 9, 1989. Transmittal 988 is scheduled to become effective on August 13, 1989.

2. On July 19, 1989, NYT filed Application No. 130 requesting Special Permission to file changes to Transmittal 988.[1] Special Permission No. 89-563 was granted on July 21, 1989,[2] and NYT filed Transmittal 1001 on July 24, 1989. This latter filing reduces the initially proposed non-recurring charge from $1147 to $398.

3. US Sprint's petition does not oppose NYT's proposed service, which provides for DS3 to DS1 multiplexing at intermediate hubs. US Sprint Petition at 1-2. In fact, says US Sprint, Transmittal 988 is part of a negotiated agreement between NYT and US Sprint which resulted in the dismissal of a complaint brought by the interexchange carrier.[3] *Id.* at 2. US Sprint does, however, oppose the proposed non-recurring charge of $1147 for the reconfiguration of DS1 circuits onto DS3 facilities as being excessive.

4. While in its reply NYT initially disputes US Sprint's assertion that the proposed non-recurring charge is excessive, NYT filed Transmittal 1001 to reduce the disputed charge from $1147 to $398. NYT contends that it was able to reduce the non-recurring charge after identifying "more streamlined operational procedures." NYT Transmittal 1001, Description and Justification at 4.

5. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Therefore, IT IS ORDERED that the petition for partial rejection or, in the alternative, for partial suspension and investigation filed by US Sprint Communications Company Limited Partnership against New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 988, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Letter of July 19, 1989, from C. McDougald, General Attorney, New York Telephone Company, to Secretary, Federal Communications Commission.

[2] Letter of July 21, 1989, from Chief, Tariff Division, to Executive Director-Federal Regulatory Matters, NYNEX Telephone Companies.

[3] *See* US Sprint Communications Company Limited Partnership v. New York Telephone Company, File No. E-89-33, 4 FCC Rcd 4060 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH OPERATING COMPANIES Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 321, 328, 331, 333, and 337
SOUTHWESTERN BELL TELEPHONE COMPANY Revisions to Tariff F.C.C. No. 68	Transmittal No. 1816
GENERAL TELEPHONE OPERATING COMPANIES Revisions to Tariff F.C.C. No. 1	**CC DOCKET NO. 89-305** Transmittal No. 534

ORDER

Adopted: August 10, 1989; Released: August 11, 1989

By the Chief, Common Carrier Bureau:

1. By the above-reference transmittals,[1] the local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[2] The revisions are scheduled to become effective on dates ranging from August 13, 1989, to August 28, 1989. None of the revisions is opposed.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[3] The above-referenced Ameritech Operating Companies (Ameritech) and Southwestern Bell Telephone Company (SWB) transmittals raise the same issues as those transmittals subject to our *LEC Designation Order* and therefore will be subject to the outcome of that investigation. We grant Ameritech and SWB special permission to advance the effective dates of their transmittals, as necessary.

3. On June 28, 1989, the Bureau released an Order[4] initiating a separate investigation of a number of ICB rates proposed by General Telephone Operating Companies (GTOC). GTOC's proposed tariff Transmittal 534 raises similar issues to those raised by the ICB rates subject to the *GTOC Designation Order*, and therefore will be subject to the outcome of the investigation in CC Docket 89-305. We also grant GTOC special permission to advance the effective date of its transmittal.

4. Accordingly, IT IS ORDERED that Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 321, 328, 331, 333, and 337, and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1816, are subject to the investigation instituted in CC Docket 88-136.

5. IT IS FURTHER ORDERED that General Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 534, is subject to the investigation instituted in CC Docket 89-305.

6. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraphs 4 and 5, *supra*, may file tariff revisions to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-624.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

8. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to the investigations in CC Docket 88-136 and CC Docket 89-305 shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigations.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 321, filed June 14, 1989; Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 328, filed July 3, 1989; Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 331, filed July 7, 1989; Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 333, filed July 10, 1989; Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 337, filed July 14, 1989; General Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 534, filed Aug. 4, 1989; Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1816, filed June 16, 1989.

[2] We note that while the LECs' filings also proposed ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*LEC Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, rel. Jan. 27, 1989.

[4] GTE Telephone Operating Companies, Memorandum Opinion and Order, CC Docket No. 89-305, rel. June 28, 1989 (Com.Car.Bur.) (*GTOC Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-374

In the Matter of

Inquiry into Alleged
Abuses of the Commission's
Processes by Applicants for
Broadcast Facilities

ORDER

Adopted: June 27, 1989; Released: August 10, 1989

By the Commission:

1. The Commission has before it a "Motion to Seal Record" (Motion), filed April 3, 1989, by Bernard Boozer (Boozer), *pro se*. Although it is not entirely clear what relief Boozer is seeking,[1] it appears that he is requesting the Commission to stay the instant proceeding, return all documents obtained by subpoena, and seal the record developed to date. For the most part, Boozer's pleading consists of a recapitulation of arguments he has made on past occasions in the courts and before this agency in connection with this investigatory proceeding.

2. This case involves an investigatory proceeding under Section 403 of the Communications Act of 1934, as amended. As we stated earlier in this proceeding, the Commission is the only party to a Section 403 investigation. *Order*, 4 FCC Rcd 1568 (1989). Because Boozer is not a party to this proceeding, he does not have standing to file his instant motion. Therefore, his motion will be dismissed. Moreover, even if we were to consider Boozer's motion on the merits, we would deny it. Boozer's motion, as noted, appears to seek a stay of the investigation. In order to justify a stay, it must be demonstrated that: (1) the petitioner is likely to prevail on the merits; (2) without such relief the petitioner will be irreparably injured; (3) the issuance of the stay would not substantially harm other interested parties; and (4) a grant of the stay would be in the public interest. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) modified, *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Other than claiming that this proceeding violates his right to the attorney-client privilege, a claim previously considered and rejected by the Commission's *Order*, *supra*, Boozer makes no showing as to how denial of his stay request would cause him irreparable harm. Furthermore, Boozer does not even attempt to meet the other prongs of the stay test. Consequently, Boozer's motion would also fail on the merits.[2] In light of our decision not to stay the proceeding, Boozer's requests regarding the record will also not be granted.

3. Accordingly, IT IS ORDERED that the Motion to Seal Record, filed on April 3, 1989, by Bernard Boozer, is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Boozer's Motion appears to be an amalgam of various other pleadings. For example, at one point Boozer concludes that "this Court should issue a preliminary injunction . . . ." At another point, Boozer seeks relief under Sections 1.311 to 1.325 of our rules which pertain to discovery. At yet another point Boozer requests that the Commission, *inter alia*, enjoin the instant investigation.

[2] In reaching this conclusion, the Commission recognizes "that the rambling and confused pleadings of litigious *pro se* parties are entitled to patient analysis and reasoned decision." *Christian Childrens Network, Inc.*, 1 FCC Rcd. 982 (1986), citing *Martin-Trigona v. Smith*, 712 F.2d 1421, 1424 (D.C. Cir. 1983). *Pro se* parties, however, still must comply with the Commission's Rules and policies. *Mandeville Broadcasting Corp.*, 2 FCC Rcd. 2523, 2524 (1987). Here, even if Boozer had standing to file his instant motion, he has failed to demonstrate the elements which warrant the relief requested.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-95

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION

ORDER

Adopted: August 11, 1989; Released: August 14, 1989

By the Chief, Common Carrier Bureau:

1. On June 28, 1989, this Bureau released an Order in the above-captioned proceeding, directing Communications Satellite Corporation (Comsat) to use a specified methodology to calculate the allocation of its refund obligation established in CC Docket Nos. 80-634 and 85-568.[1] The *Allocation Order* directed Comsat to use its month-by-month billing records for the period in question, using the calculation methodology proposed by TRT Communications Corporation. *Allocation Order*, 4 FCC Rcd at 1-2. The *Allocation Order* also established a filing date of July 27, 1989, for Comsat's calculations, and a date of August 11, 1989, for comments by interested parties. *Id.* at 2. Comsat requested a 90-day extension of time, and on July 26, 1989, we released an Order granting Comsat's request in part and establishing a new filing date of August 15, 1989.[2] Now Comsat has filed a motion for further extension of time, to October 25, 1989, to correspond to its original request for extension of time. No party filed in opposition to Comsat's motion. We are granting Comsat's request.

2. In the *Extension Order*, we noted that Comsat sought its original extension of time in order to provide each customer with the data pertinent to the calculation of that customer's refund, to review the data with that customer, and to resolve any questions or discrepancies. [3] In its motion for further extension of time, Comsat states that while it has mailed the relevant information to the parties and has begun to receive responses, due to the age and complexity of the accounting records involved, additional time is necessary for customers to review their records and confirm Comsat's calculations. Comsat Motion for Further Extension of Time at 2. We believe that Comsat has adequately justified its extension request. As we stated in the *Extension Order*, we wish to see this proceeding resolved, and customers receive their refunds, as expeditiously as possible. However, we conclude under the circumstances that granting Comsat's request will best achieve that goal while making the necessity of Commission intervention to resolve disputes less likely. Our confidence in this view is bolstered by the fact that Comsat's motion is unopposed.

3. In granting Comsat's motion, we are cognizant that recently enacted amendments to the Communications Act have established statutory deadlines for final Commission action in certain preceedings initiated under Sections 204(a), 208(b), and 405(b) of the Act.[4] We conclude, however, that these statutory deadlines are inapplicable to this proceeding. The instant proceeding in CC Docket No. 88-95 was begun by the Bureau in a February 1988 Order that initiated this docket to determine an allocation methodology and resolve the question of whether carrier customers would be required to flow through to end users whatever funds they received from Comsat.[5] The statutory authority referenced for initiation of this proceeding was Sections 4(i), 4(j), 201(b), and 205(a) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 205(a), and Section 201(c)(5) of the Communications Satellite Act, 47 U.S.C. § 721(c)(5).[6] None of these sections falls within the purview of the statutory deadline legislation. Thus, our granting of Comsat's extension request would not risk violation of any statutory constraint.

4. Accordingly, IT IS ORDERED that the request of the Communications Satellite Corporation for a further extension of time, to October 25, 1989, in which to file its refund allocation data IS GRANTED.

5. IT IS FURTHER ORDERED that comments on the Comsat filing are due no later than November 10, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Communications Satellite Corporation, Memorandum Opinion and Order, CC Docket No. 88-95, 4 FCC Rcd 5230 (Com.Car.Bur. 1989) (*Allocation Order*).

[2] Communications Satellite Corporation, CC Docket No. 88-95, Order, DA 89-880 (released July 26, 1989) (Com.Car.Bur.) (*Extension Order*).

[3] *Extension Order* at ¶ 2.

[4] *See* Public Law 100-594, 102 Stat. 3023. The amendments require that tariff investigations commenced under Section 204 and certain complaints commenced under Section 208 be concluded within one year after the proceedings are initiated, or within one year after the date of enactment, whichever is later. The new law also requires that action on certain petitions for reconsideration under Section 405 be concluded within 90 days after the petitions are filed.

[5] Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, 3 FCC Rcd 1130 (Com.Car.Bur. 1988) (*February 1988 Order*).

[6] *See id.* at 1131.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-354

In re Applications of

MARK A. PERRY File No. BPH-860813MW

AUDIO BROADCASTERS, INC. File No. BPH-860813MX

For Construction Permit for a New FM Station at Channel 273A in Crossville, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1989; Released: August 21, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL issuing a Separate Statement.

1. On May 1, 1989, Mark A. Perry (Perry) filed a Notice of Appeal with the Review Board (pursuant to 47 CFR §1.302(b)), from a *Memorandum Opinion and Order*, FCC 89M-1230, released April 20, 1989 of Administrative Law Judge John M. Frysiak (ALJ), which *Order* dismissed Perry's application, granted the competing application of Audio Broadcasters, Inc. (ABI), and terminated the above-captioned hearing. Subsequently, Perry, acting *pro se*, filed a document styled "Exceptions to Initial Decision" on May 23, 1989. Given the circumstances here presented, we will treat Perry's "Exceptions" as his appeal, and address the dismissal of his application.[1]

2. In his "Appeal," Perry argues "that the dismissal of my application by the ALJ, and ultimately the termination of the hearing, was due to circumstances beyond my control . . . [and] it was the neglect of his [former] attorney, the Counsel of Record prosecuting his application, not his personal lack of qualifications, that caused the ALJ to find for the competing applicant, ABI." "Appeal," at p. 2.

3. *Background*: On August 13, 1986, Perry (a broadcaster with some fifteen years experience), acting *pro se*, filed an application to establish a new FM station in Crossville. Perry's application (FCC Form 301) indicated that all sections of his application, including the technical engineering sections, were prepared and certified by Perry himself. Appended to his application was a copy of FAA Form 7460-1 (Notice of Proposed Construction or Alteration), seeking from the FAA the necessary "determination of no hazard" for Perry's proposed antenna/transmitter site. This FAA form was executed and certified by Perry on August 12, 1986. Because no favorable determination had yet been issued by the FAA, and nearly two years after Perry's application was filed with the FCC, it was designated for consolidated comparative hearing by *Hearing Designation Order*, 3 FCC Rcd 4755 (1988) (HDO), with the following issue specified against Perry: "To determine whether there is a reasonable possibility that the tower height and location proposed by Perry would constitute a hazard to air navigation."

4. Thomas L. Root, Esquire, filed a Notice of Appearance as Perry's hearing counsel on August 26, 1988. At the comparative hearing session on February 15, 1989,[2] Perry (now accompanied by counsel) did nevertheless testify with respect to his proposed transmitter site. He claimed that sometime in 1988 (but after this case was designated for hearing), he had personally contacted the FAA and was informed that the FAA had "no record" of his having filed a Notice of Proposed Construction (FAA Form 7460-1) with that agency in 1986. Tr. 43-47. Perry also averred that, in 1988, he submitted a second Notice of Proposed Construction to the FAA; and, he claimed, he had informally ascertained that the FAA received his 1988 request for tower approval. Tr. 47, 58-59.

5. Following the close of the February 15, 1989 comparative hearing session, Perry's competitor, ABI, filed a "Freedom of Information Act" (FOIA) request with the FAA's East Point, Georgia office, seeking any and all documents filed by Perry pertaining to his *original* (1986) tower site. In its March 20, 1989 FOIA request to the FAA, ABI attached copies of Perry's August 12, 1986 FAA Form 7460-1 (which was apparently not received by the FAA until October 2, 1986), as well as the FAA's "Acknowledgement Notice of Proposed Construction or Alteration" dated March 6, 1987. This latter FAA document negatively advised that Perry's tower proposal "would exceed Part 77 obstruction standards," but that if the structure were reduced in height by 20 feet, FAA obstruction standards would not be offended. In other words, it now appeared that the FAA had informed Perry in March 1987 that his August 1986 request for a "determination of no hazard" had been conditionally denied. Thereafter, by covering letter dated April 7, 1989 addressed to ABI, the FAA forwarded official copies of these two Perry documents (as well as an aeronautical chart depicting the Crossville, Tennessee area). The FAA letter to ABI stated that "enclosed are copies of all information on the proposed tower in Crossville, Tennessee. We have no records of other towers being built at that location." ABI Opposition, Exh. 4. We also observe that the FAA's March 6, 1987 "Acknowledgement of Notice of Proposed Construction" (rejecting Perry's 1986 tower clearance request) indicates that a copy was forwarded to the FCC.

6. Based on these official FAA documents (copies of which were apparently earlier obtained by ABI from an unidentified source), ABI filed, on March 14, 1989, a "Motion to Enlarge Issues," seeking a misrepresentation issue against Perry. On the same date, ABI also filed a "Motion for Summary Decision or, in the Alternative, Motion to Dismiss for Failure to Prosecute"; thereafter, ABI filed a "Motion to Dismiss," dated April 3, 1989. On April 20, 1989, the ALJ released the *Memorandum Opinion and Order*, which we are here asked to review. Therein, the ALJ held that all of ABI's requests for relief were justified. First, and based on the FAA documents, the ALJ held that substantial and material questions of fact were presented with respect to Perry's initially proposed transmitter site, and that a misrepresentation issue was warranted against Perry. Thus, the ALJ added the following specific issue[3]:

To determine whether, during his testimony at hearing, Mark A. Perry intentionally misrepresented the nature and substance of his contacts with the Federal Aviation Administration regarding his proposed antenna tower and the filing of his Notice of Proposed Construction or Alteration, and, if so, the effect thereof on Perry's basic qualifications to be a Commission licensee.

7. Second, the ALJ held (with respect to ABI's "Motion for Summary Decision")[4]:

> ABI also seeks summary judgment on the outstanding FAA issue against Perry. *The motion is unopposed.* ABI notes that Perry never requested a further aeronautical study, nor did he lower his antenna tower height to come within FAA regulations. Perry no longer may request a further aeronautical study because such request was limited to within 30 days of the date of the FAA acknowledgement. Further, were Perry now to reduce his antenna tower height he would have to amend his application. ABI argues that such amendment would not be acceptable unless Perry would demonstrate good cause, something he cannot do in light of his complete failure to act in a diligent manner (for more than two years). *See Erwin O'Connor Broadcasting, Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970). Perry's woeful nonfeasance dictates that an adverse summary decision be made on the air hazard issue specified against Perry. *See also Neil I. Sanders*, 102 FCC 2d 865, 867, 59 RR 2d 176, 178 (Rev. Bd. 1985); *Omaha Channel 54 Broadcasting Group Ltd. Partnership*, 3 FCC Rcd 870, 871-72, 64 RR 2d 1010, 1013-14 (Rev. Bd. 1988).
>
> Based on the *unrebutted evidence* presented in the instant Motion, *there can be "no genuine issue of material fact" regarding the factual basis of the Motion* and the legal conclusion dictated by the indisputable facts is inescapable. *At the hearing session held February 15, 1989, Perry had an opportunity to offer proof regarding the air hazard issue which had been specified against him.* He chose not to do so and instead relies on an FAA approval. But to get FAA approval, Perry would have to amend his application, but he cannot meet the stringent test of good cause as set out by *Erwin O'Connor, supra.* The Motion for Summary Decision, filed March 14, by ABI IS GRANTED and the air hazard issue specified against Perry IS RESOLVED against his favor.

8. Third, with respect to ABI's later-filed "Motion to Dismiss," the ALJ held[5]:

> Additionally, ABI by its motion of April 3, 1989 seeks the dismissal of the Perry application on the grounds that Perry has failed to prosecute his application. According to ABI, Perry's counsel failed to attend a deposition session scheduled for March 31, 1989, on the extant financial qualification issue specified against Perry. No explanation was given accounting for Perry's counsel's absence.
>
> ABI also notes that Perry has failed to produce documents as directed by *Order*, FCC 89M-951, released March 24, 1989, and to exchange on April 7, 1989 any exhibits concerning the specified financial qualification issue as required by *Memorandum Opinion and Order*, FCC 89M-648, released February 27, 1989. Further, it is noted as evidenced in the initial paragraph herein, Perry has failed to file an opposition to any of the pleadings considered herein.
>
> These repeated defaults evidence a lack of good faith intent to prosecute an application and are sufficient grounds to dismiss the Perry application. *Cf. Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986) where the Commission stated that the prosecution of an application includes timely compliance with procedural and substantive rules. The motion to dismiss Perry's application will be granted.

9. In his instant "Appeal," Perry argues, *inter alia*, that his[6]:

> . . . entire appeal is based on the fact that he relied solely on legal counsel that, without notifying The Commission nor Perry, apparently withdrew himself from being Perry's Counsel of Record. (Prior to the deadline for filing the Hearing Appearance Notice (August 1988) Perry retained the legal representation of Thomas L. Root, P.C. Attorney at Law, 2021 L Street, N.W., Suite 750, Washington D.C. 20036 to represent and prosecute his application in the matter. Mr. Root accepted the case and proceeded accordingly). It is apparent that, near the end, Mr. Root failed to respond to motions filed by ABI, orders by the ALJ, and even attend a deposition in which he, Mr. Root, had rescheduled to accommodate his calendar. These issues are a matter of record in the proceeding and were the basis for the dismissal of the Perry application by the ALJ. Perry pleads, however, that he was unaware of his counsel's failures until it was too late.

10. *Discussion:* Two questions are thus presented. First, was it appropriate for the ALJ to grant summary decision on the originally-specified "air hazard" issue in light of the conflict between Perry's hearing testimony and the purport of the FAA documents filed by ABI.[7] Second, even if the ALJ's summary decision was premature (*see* note 7, *supra*), was the ALJ's dismissal of Perry's application for failure to prosecute justified under Commission precedent. Because the record before us amply demonstrates that the ALJ's dismissal of Perry's application for failure to prosecute was appropriate, we need not resolve the first question.

11. In this proceeding, Perry's delicts with respect to his failure to prosecute are legion. For example, (1) a deposition session was scheduled for March 31, 1989, on an existing financial issue specified against Perry; Perry's counsel failed to attend,[8] and no explanation or reason for the failure to attend was proffered; (2) by *Order*, FCC 89M-951, released March 24, 1989, the ALJ directed that Perry produce certain documents pertaining to his financial qualifications; absent any explanation or excuse, the ordered documents were not produced; (3) the ALJ ordered the exchange of exhibits for the forthcoming hear-

ing session on Perry's financial qualifications on April 7, 1989 (*see Memorandum Opinion and Order*, FCC 89M-648, released February 27, 1989); again, absent any excuse or explanation, the ordered exhibits were not produced or exchanged; (4) on March 14, 1989, ABI filed a "Motion for Summary Decision or, in the Alternative Motion to Dismiss for Failure to Prosecute"; no response was filed to this Motion; (5) ABI similarly filed on March 14, 1989, a "Motion to Enlarge Issues" directed against Perry, claiming additional substantial and material questions of fact regarding Perry's basic qualifications to be a licensee; no response was filed to this Motion; (6) on April 3, 1989, ABI filed a "Motion to Dismiss" Perry's application, citing Perry's continued failure to prosecute his application; no response was filed to this Motion; and, finally, (7) on May 31, 1989, ABI filed another "Motion to Enlarge Issues" against Perry; again, no response was filed to this Motion, even though Perry, acting *pro se*, had earlier filed the instant "Appeal" seeking to reinstate his application and to "preserve" his rights in this proceeding.

12. In closer focus, after having been rescheduled once at Perry's request, Perry's counsel failed to appear at deposition in Crossville, Tennessee, to which ABI's attorney had specially repaired at ABI's expense. Despite having been put on notice by his counsel's totally unexplained absence from the rescheduled Tennessee deposition requested by Perry, he does not here indicate what actions, if any, he took to rectify the situation. Nor does Perry explain what measures he took to ensure the submission of a response to ABI's March 14, 1989 Motion for Summary Decision on the disqualifying transmitter site issue against him, or to respond to ABI's Motion to Enlarge Issues to include a misrepresentation issue against him.

13. Nor does Perry explain, despite counsel's failure to appear at deposition, and in the face of an outstanding and unopposed Motion for Summary Decision, why he did not take immediate steps to forefend ABI's April 3, 1989 Motion to Dismiss his application for failure to prosecute, or to respond to that fatal motion in any respect, or even to file a *late* response to ABI's Motion to Dismiss (or to seek reconsideration of the ALJ's April 20, 1989 *Order)*. Instead, Perry waited until May 23, 1989 to file with the Board an "Appeal" of his dismissal, seeking to blame these cumulative failures entirely on counsel. Incredibly, *despite the pendency of this very appeal, in which Perry seeks forgiveness for failing to respond to critical pleadings*, Perry has *still* not responded to a pending ABI Motion to Enlarge Issues, filed on May 31, 1989 (which was served directly on Perry). The record is clear that, at least by March 31 (if not before), Perry was aware that his application was in dire peril of immediate dismissal, unless steps were taken to ameliorate the damage done by mounting acts of nonfeasance. Now, two months after Perry's critical failures to prosecute, he asks that he be reinstated only to face four disqualifying issues yet arrayed against him, to wit: an FAA "air hazard" issue, a misrepresentation issue arising therefrom, a financial issue, and another misrepresentation issue related thereto.[9]

14. Perry knew from mid-March that his application was in final jeopardy; that on March 31, 1989 a critical deposition was missed without explanation. Yet, his instant pleading artfully avoids explaining any diligent measures taken by Perry himself to avoid dismissal. When he failed to oppose, or even respond to, ABI's April 3 Motion to Dismiss his application, the ALJ had little choice in the face of ABI's pending (and unopposed) motion but to grant that motion. The public interest in initiating a new broadcast service, and in protecting other fully qualified applicants from the cost and delays occasioned by Perry's studied indifference to procedural demands, will not permit this level of non-prosecution.

15. The Commission's Rules, Section 73.3568(b), 47 C.F.R. §73.3568(b), monish that "[f]ailure to prosecute an application . . . will be cause for dismissal . . . ." Recently, the Court of Appeals affirmed the Board's dismissal of an applicant for failure to timely file specifically required documents in a comparative proceeding. In so doing, the Court noted:

> In reviewing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

Comuni-Centre Broadcasting, Inc., v. F. C. C., 856 F.2d 1551, 1554 (D.C. Cir. 1988) (footnote omitted). The Court further observed (*id.*, at 1556 n. 40):

> The Review Board acknowledged [earlier in this proceeding] that in some cases sanctions less severe than dismissal might be appropriate, particularly when dismissal would penalize clients unaware of the laxity of their attorneys. *Cf. Shea v. Donohoe Const. Co., supra* note 22, 254 U.S. App. D.C. at 182, 795 F.2d at 1078. The Review Board stated, however, "we do not believe that Comuni-Centre may properly escape responsibility for its counsel's dilatoriness, since the filing deadline and prior litigation history were known (or should have been known) by the applicant's principals as well as its counsel." *Rev. Bd. Order, supra* note 5, 102 F.C.C. 2d at 1242 n. 4.

16. The Commission also holds that "reasonable discretion" vests in its presiding officers, who are responsible for administering the course of adjudicatory hearings, *See* Sections 1.241 and 1.243, 47 CFR §§1.241 and 1.243; *see also Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 170-171 (Rev. Bd. 1982) (and cases cited therein). "Reasonableness" is assessed in light of the circumstances of each case, to ensure that a proper balance is struck "between the need of the Commission to protect the integrity of its procedures and administrative techniques in view of its limited resources, and the public interest in seeing that scarce broadcast facilities go to the best qualified applicant." *Id.*, at 171. In affirming the Board's dismissal of an applicant for failure to comply with various procedural deadlines throughout the course of a proceeding, the Commission stated:

> We agree with the Board that prosecution of an application means timely compliance with procedural and substantive rules, including ALJs' orders, *Vue - Metrics, Inc.*, 69 F.C.C. 2d 1049, 1058 (1978) . . . .

* * *

> Furthermore, we have also, among other things, made significant changes in the way the Commission conducts its comparative hearing proceedings so as to achieve more efficiency and an expeditious point of finality. *See, Report and Order*, 72 FCC 2d 202 (1979). In doing so, we determined that the effective and expeditious dispatch of the Commission's business is, in itself, an integral part of the public interest. Consistent with this determination that new service should be provided to the public in the most efficient, expeditious manner possible, ALJs must be given broad discretion to regulate the course of multiparty comparative hearings. Here, the ruling in question is clearly within the bounds of the authority delegated to ALJs as well as fully in accord with our current policies. In view of the foregoing and the specific facts concerning [the applicant's] failure to respond in any way to the motion seeking dismissal of its application following a series of other deficiencies, we find no error in the ruling below.

Hillebrand Broadcasting, Inc., 1 FCC Rcd 419 (1986) (footnote omitted), *appeal dismissed mem. sub nom. Punta Ybel Communications, Ltd., v. F. C. C.*, No. 86-1670 (D.C. Cir. Feb. 29, 1988). The Commission there further declared:

> We emphasize that we do not lightly affirm the dismissal of an application where, as here, the failures are those of counsel and not the applicant. Counsel is the applicant's agent, however, and the applicant is bound by counsel's actions. Thus, although it is counsel rather than applicants who generally appear before us in these matters, they do so on behalf of their applicants. Were we to excuse all failures of counsel, we would leave our ALJ's with no power to control proceedings. This would severely hinder the efficiency of our proceedings, particularly those involving multiple parties, which in turn would be unfair to the other applicants and would delay service to the public.

1 FCC Rcd at 420 n. 6; *see also Albert E. Gary*, 4 FCC Rcd 4112, 4113 (Rev. Bd. 1989). We agree that the numerous failures of Perry to prosecute his application must result in his dismissal from this proceeding. The factors set forth by the court in *Comuni - Centre* have been met here. No orderly administrative process could excuse Perry's lassitude, or function with fairness to other applicants, were we to permit such nonsense.

17. ACCORDINGLY, IT IS ORDERED, That the "Appeal" filed May 23, 1989, by Mark A. Perry IS DENIED; and,

18. IT IS FURTHER ORDERED, That the Motion to Enlarge Issues filed May 31, 1989, by Audio Broadcasters, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Perry's "Appeal", submitted pursuant to 47 CFR §1.302(a), was filed one day late. However, we will waive the filing deadline. It should be noted that while Perry's "Appeal" was filed *pro se*, the formal "Notice of Appeal" was filed by newly-retained counsel on Perry's behalf.

[2] By *Order*, FCC 89M-575, released February 17, 1989, the ALJ indicated that the record "on the designated comparative issue" was closed, and that the "designated air hazard issue" against Perry would be heard later, "at time to be specified." No further hearing on that basic qualifying issue occurred.

[3] *Order* at paras. 3-4.

[4] *Order* at paras. 5-6; emphases added.

[5] *Order* at paras. 7-9.

[6] Perry "Appeal" at pps. 4-5.

[7] For an ALJ to properly grant summary decision, there must be "no genuine issue as to any material fact." Section 1.251(d) of the Commission's Rules, 47 C.F.R. §1.251(d); *Valley Broadcasters, Inc.*, 3 FCC Rcd 6734, 6735 (1988); *Meredith Corporation*, 2 FCC Rcd 3927, 3928 (Rev. Bd. 1987); *GAF Broadcasting Co.*, 96 FCC 2d 411, 416 (Rev. Bd. 1984); *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). Here, had we not affirmed the ALJ's dismissal for Perry's failure to prosecute, we might well have remanded this proceeding, *inter alia*, for the adduction of additional evidence on the initial "air hazard issue." As suggested at note 2, *supra*, the ALJ indicated that the "*comparative*" hearing record was closed following the February 15, 1989 hearing session. But, the ALJ also specifically declared that the "air hazard" issue would be heard at a later date. Nevertheless, in his *Order* under appeal herein, the ALJ, in granting ABI's Motion for Summary Decision, faults Perry for his failure to "offer proof regarding the air hazard issue" at the "*comparative*" hearing session on February 15, 1989.

[8] ABI's unopposed Motion to Dismiss, filed April 3, 1989, alleges the following (at pps. 2-3):

> On March 16, counsel for ABI contacted Ms. Tobin, an associate in Thomas Root's firm, Perry's attorneys of record, to confirm the deposition date which was set for April 4. Ms. Tobin conferred with Mr. Root, and requested that the deposition be rescheduled for March 31, as Mr. Root had a conflict on April 4. Counsel for ABI agreed to the March 31 date, provided that the documents requested in the March 10 Motion for Production of Documents be produced prior to, or at, Perry's deposition. Ms. Tobin agreed to produce the documents prior to, or at, Perry's deposition.
>
> On March 24, counsel for ABI delivered, by hand, a letter to Mr. Root's office, confirming the March 16 agreement . . . . Mr. Root's office called ABI's counsel on March 24 and represented that Mr. Root confirmed the understanding reached on March 16.

> On March 31, counsel for ABI travelled to Crossville, Tennessee. (The total travel time to reach the place of deposition was approximately five and one-half hours.) Perry was present but Root was not. Counsel for ABI contacted Mr. Root's office at approximately 1:15 p.m. EST, and was informed that Mr. Root was flying his own private plane to Crossville and that he had left Washington that morning. Counsel for ABI called back to Mr. Root's office several times over the course of the next two hours. However, Mr. Root's office had not heard from Mr. Root. Counsel for ABI requested of Mr. Root's office the plane identification number of Mr. Root's plane which would enable the FAA to identify the location of Mr. Root's plane. Mr. Root's office indicated that they did not have his plane number . . . .

[9] By *Memorandum Opinion and Order*, FCC 89M-648, released February 27, 1989, the ALJ added the following issues against Perry: (1) To determine whether Mark A. Perry lacked candor by failing to report the foreclosure on both his FmHA loans; and, (2) To determine whether Mark A. Perry is financially qualified to be a Commission licensee. Had this proceeding been remanded, Perry would also appear to have been facing some rather formidable hurdles. Specifically, in addition to the site misrepresentation issue and the "air hazard" issue, there were these two outstanding qualifying issues added against Perry arising from allegations (ABI Motion to Enlarge [Financial] Issues, filed January 18, 1989) that he had defaulted on a government loan (Farmers Home Administration) for his residence. (Perry, through counsel, did file a late opposition (later stricken by the ALJ), but admitted therein the default "had been continuing for at least the past twelve months, or since at least June 1986." (Perry Opposition, filed February 13, 1989, at p. 5). ABI has now submitted copies of *two* new default judgements entered against Perry in Tennessee (as of February 7, 1989, and April 11, 1989) (ABI Motion to Enlarge Issues, filed May 31, 1989). Perry, as noted in text, had not opposed this latest Motion.

SEPARATE STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

This appeal focuses upon the asserted failure of Thomas Root, the now renowned airbourne barrister, to prosecute the application of Mark A. Perry for a new FM station in Crossville, Tennessee. It is the second such dismissal we have confronted in recent months involving this same attorney, *see Albert E. Gary*, 4 FCC Rcd 4112 (Rev. Bd. 1989), and could well be only another link in a longer chain of cases where this attorney's clients have been dismissed by our ALJs for failure to prosecute their applications. *See also McClenahan Broadcasting, Inc.*, FCC 89M-1061, released April 4, 1989 (Charlottesville, Virginia); *Shirley Marchant*, FCC 89M-1212, released April 19, 1989 (Omega, Georgia); *Mary Faye Gilbert*, FCC 89M-1285, released April 27, 1989 (Belle Chasse, Louisiana); *V.O.B. Incorporated*, FCC 89M-1735, released June 27, 1989 (Ankeny, Iowa). Because the law traditionally looks with disfavor upon the abrupt dismissal of a litigant's case when the operative cause is the neglect of counsel, *see generally Shea v. Donohoe Const. Co., Inc*, 795 F.2d 1071 (D.C. Cir. 1986),[1] it is imperative that the Board's affirmation of any terminal dismissal be supported by the application of uniform standards that assure (1) patient regard for the plight of the affected litigant, consistent with (2) the plight of other competing applicants and the public's right to the expeditious initiation of a new broadcast service.

In the recent *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), the court reviewed the dismissal of a broadcast applicant for its counsel's tardiness in filing a number of pleadings in a comparative broadcast licensing proceeding. Harkening to the strict tenor of *Shea v. Donohoe* (and cases cited therein),[2] Judge Robinson declared:

> In reviewing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

856 F.2d at 1554. The panel affirmed our dismissal in that case because it agreed with this Board that counsel's "pattern of dilatory conduct . . . had interfered with the orderly conduct of the proceeding and that other parties were prejudiced" by the tardiness of counsel. *Id.*, at 1556. At the same time, the court pointedly echoed that "[t]he Review Board acknowledged that in some cases sanctions less severe than dismissal might be appropriate, particularly when dismissal would penalize clients unaware of the laxity of their attorneys," but the court also repeated that we had additionally found that "counsel's dilatoriness . . . and prior litigation history were known (or should have been known) by the applicant's principals" as well. *Id.*, at n. 40.

It is evident from *Comuni-Centre* that the circuit court cuts this Commission appreciably more slack in the dismissal of litigants than it affords to the federal district courts on the same grounds, *see supra* note 2. However, our apparently wider discretion in this regard is prudently constrained by the criteria consulted by the *Comuni - Centre* court to assure against precipitate dismissals. It would seem, synthesizing all of the court's reference points, that we should carefully review applicant dismissals by surveying the following factors:

1. Was the fatal dereliction merely an isolated event, or part of a pattern which disrupted the proceeding to the palpable prejudice of other applicants;

2. Was there client knowledge of, responsibility for, or complicity in the operative dereliction(s);

3. On appeal of a dismissal, is the applicant represented by culpable counsel; and,

4. Are there other equitable considerations that might mitigate against absolute dismissal.

If factor (1), above, is answered in the affirmative, dismissal would appear to be consistent with case precedent, irrespective of a demonstrated fault of the client. *See Hillebrand Broadcasting, supra* note 1. Certainly, if the derelictions can be laid, in significant part, to the action (or inaction) of the applicant, a stronger case for dismissal arises, even if the dilatory pattern is not as pronounced. Broadcast applicants have a nondelegable

duty under our rules to prosecute their proposals with continuing diligence; and they themselves may not be a font of disruption or prejudice. In factor (3), above, we should seek to nullify the "parenticide"/"orphan's mercy" defense syndrome. That is, derelict counsel should not be permitted to excuse a pattern of serious representational failures by later interposing the plight of the client. If an attorney does not consider the consequences to a client *at the time of the derelictions*, that same counsel should not be permitted to hide behind the client's skirts and, thus, grant self-absolution for its acts of professional neglect. In factor (4), we should yield leeway for any defenses, practical or compassionate. that conjure the extraordinary. It is not necessary here to adumbrate such circumstances, since by nature these situations will all have an idiosyncratic character.

In the case at hand, the majority expresses its view that the "pattern of dilatory conduct" here is as aggravated as that depicted in *Comuni-Centre*, that the court's dismissal criteria have been properly consulted, and that the policy of a reduced tolerance for nonfeasance announced in *Hillebrand* supports affirmation of Perry's dismissal. While I think its a close-run thing, Perry's history in the prosecution of this application -- from his tower site failures to these successive pleading failures -- tends to dilute his plaint that counsel alone is responsible for his undoing. I will, therefore, concur, but somewhat more warily, for I believe that the *more* erratic the conduct of counsel, the *greater* the equities usually running to the client. And, when the conduct of counsel is so contrary to normative legal practice as to be downright bizarre, it corresponds generally that the client should not be held to foresee any such gross departures. If, and as, we address any future appeals based upon the recently inexplicable activities of Mr. Root, we should contemplate the four factors I have suggested above, to ensure that *we* do not become as quick to the trigger as, say, a loose Smith & Wesson .32 revolver.[3]

FOOTNOTES TO STATEMENT

[1] *See also Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n.6 (1986) ("We emphasize that we do not lightly affirm the dismissal of an application where, as here, the failures are those of counsel and not the applicant").

[2] It is clear that the *Comuni-Centre* court did not apply directly the rigorous standards of *Shea v. Donohoe* to the Commission's dismissal there under appeal. Apart from the surface fact that *Shea* was merely referenced in a footnote to the *Comuni-Centre* decision, the *Shea* decision itself enjoins that "[s]ince our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success or would obviously prove futile." 795 F.2d at 1075. In the end, the *Shea* court enunicated its rule of law for district court guidance, informing the lower courts that (*id.*, at 1078; emphasis in original):

> We look disfavorably upon dismissals as sanctions for attorney misconduct or delay *unless the client himself has been made aware of the problem, usually through notice from the trial court.*

The *Hillebrand Broadcasting* Commission recognized the daylight between *Shea* and its own more liberal dismissal standards, even going so far as to explain its view that the *Shea* standards were not *per se* applicable to its comparative licensing proceedings. *Hillebrand* said:

> Section 4(j) of the Communications Act of 1934, as amended, authorizes the Commission to conduct its proceedings in such a manner as will best conduce to the proper dispatch of its business and to the ends of justice. In this regard, it is important to note that the Commission's comparative licensing proceedings such as this one, are markedly different from court proceedings involving tort actions. In the latter, the *rights* of the litigants are being adjudicated and appropriate redress may be ordered based thereon. However, while adjudicatory in nature, a comparative licensing proceeding is merely another procedure utilized by the Commission as a means of selecting the best qualified applicant to operate a broadcast station. Consequently, we find inapposite those court cases (*Jackson v. Washington Monthly Co.*, 569 F.2d 229 (1977) and *Butler v. Pearson, 636 F.2d 526 (1980)*) cited by Punta Ybel for requiring a reinstatement of its application. Nor we do believe that a more recent D.C. Circuit Court opinion would require us to take such an action (*William C. Shea v. Donohoe Construction Co., Inc.*, No. 85-5931, July 18, 1986).
>
> 1 FCC Rcd at 420 n.5.

The fact that the *Comuni-Centre* court merely made passing reference to *Shea*, without applying its dismissal standards at full strength, would certainly seem to vindicate the Commission's view in *Hillebrand* that the public interest in expediting a new broadcast service permits applicant dismissals for derelictions of counsel more readily than would be permitted with a federal district court's dismissal of a civil litigant. Another explanation of the different approaches refected in *Shea* and *Comuni-Centre* comes, perhaps, in *Law Offices of Seymour M. Chase, P.C. v. FCC*, 843 F.2d 517, 522 (D.C. Cir. 1988), where Judge Ruth Bader Ginsburg noted "the constant and closer supervisory authority federal courts of appeals exercise over district courts within the circuit." Appeals of FCC actions, by contrast, are generally confined to questions of whether the agency's actions are arbitrary, capricious, extra-legal, or unsupported by the evidence. *See* 5 U.S.C. § 706. In any event, this Board is instructed by *Hillebrand*, and the Commission's view that applicants may be dismissed for conduct of counsel not necessarily meeting the tougher *Shea* standards.

[3] Nothing said here is intended as a comment, favorable or unfavorable, on the merits of Perry's instant application, or on the application of any other party recently dismissed for nonfeasance of counsel. I discuss here solely the *threshold* question of whether absolute dismissal on procedural grounds, *prior to assaying the case merits*, is fully justified.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-356

In re Applications of

MICHAEL B. GLINTER File No. BP-860331AO
Winston-Salem, North Carolina
Req: 880kHz, 1kW, DA-D

SMITH MOUNTAIN LAKE RADIO File No. BP-880126AB
Moneta, Virginia
Req: 880kHz, 2.5kW, DA-D

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: August 1, 1989; Released: August 22, 1989

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications of Michael B. Glinter ("Glinter") and Smith Mountain Lake Radio ("Smith")[1] for new AM radio stations.

2. *Glinter*. Although it was initially returned as unacceptable for filing, Glinter's application was accepted *nunc pro tunc* on November 26, 1986 and given its original filing date in light of the applicant's timely filed, curative minor amendment pursuant to 47 C.F.R. § 73.3571. On December 22, 1986, Winston-Salem-Greensboro-High Point Area Radio, Inc. ("WSGH") filed a petition to deny against Glinter's application alleging, *inter alia*, that Glinter's proposal is in violation of 47 C.F.R. §§ 73.37(a) and 73.24(j) due to prohibited overlap between the applicant's facilities and the 0.5 mV/m contour of WYCV on the first adjacent channel of Granite Falls, North Carolina, and the applicant's purported failure to provide 5 mV/m coverage to Winston-Salem, North Carolina, the community to be served. An opposition was filed by Glinter on January 27, 1987, and a reply to opposition was filed by WSGH on February 18, 1987. Thereafter, by motion dated January 26, 1988, WSGH requested that the petition be withdrawn. After review of the allegations set forth in the petition to deny, we have determined that no substantial and material question of fact has been raised requiring further Commission action. Therefore, the petition filed by WSGH will, in all respects, be dismissed.

3. *Other Matters*. Glinter's application indicates that his proposed facilities will constitute a major environmental action as defined by 47 C.F.R. § 1.1307. In such situations, the applicant is required to submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. The Glinter EA is deficient since it does not address the issue of exposure of workers or the general public to levels of radio frequency (RF) radiation exceeding specified standards as required by 47 C.F.R. § 1.1307(b). Accordingly, Glinter will be required to amend his application to address the issue of RF radiation in his EA. The comparative phase of the case, however, will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom, Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. Glinter and Smith have not amended their applications to update their other broadcast interests since the time the application were first filed. 47 C.F.R. § 1.65 requires that an applicant promptly amend its application to report significant changes in information furnished to the Commission. The Commission is aware of changes in ownership information which Glinter and Smith have not reported in connection with their respective applications. Accordingly, Glinter and Smith will be required to file amendments with the presiding Administrative Law Judge detailing the changes in their other broadcast interests which have occurred since the time they filed their respective applications.

5. Except as indicated by the issues specified below, both applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding. As the proposals are for different communities, we will specify an issue to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

6. Accordingly, IT IS ORDERED, That pursuant to 47 C.F.R. § 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order upon the following issues:

1. If a final environmental impact statement is issued with respect to Michael B. Glinter, which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. § 1.1301-1319.

2. To determine, (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 U.S.C. § 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 2 hereinabove, the motion to withdraw the petition to deny filed by WSGH IS GRANTED, and, its petition to deny, in all other respects, IS DISMISSED.

8. IT IS FURTHER ORDERED, That the amendment of Smith dated August 17, 1988 IS ACCEPTED FOR FILING to the extent indicated herein.

9. IT IS FURTHER ORDERED, That 47 C.F.R. § 1.1317 IS WAIVED to the extent indicated herein to allow the comparative phase of the case to begin before the enviromental phase is completed. Within 30 days of the release of this Order, Michael B. Glinter shall submit the amended Environmental Assessment as described in paragraph 3 hereinabove, to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That Glinter and Smith shall file the amendments requested in paragraph 4 hereinabove, with the presiding Administrive Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard and pursuant to 47 C.F.R. § 1.221(c), the applicants shall within 20 days of the mailing of this Order, in person or by attorney, file with the Commission, in triplicate, written appearances stating an intention to appear on the dates fixed for the hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, the applicants shall give notice of the hearing as therein prescribed, and shall advise the Commission of the publication of such as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief,
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On August 17, 1988, Smith filed an amendment to eliminate mutual exclusivity between itself and two other applications: Dayton, VA (BP-880126AC) and Fairlawn, VA (BP-880126AD). Good cause was shown for this amendment and it is hereby accepted for filing. However, no comparative benefit to Smith shall accrue from this amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-359

In re Applications of

NORTHLAND BROADCASTERS, A LIMITED PARTNERSHIP (hereafter "Northland")	File No. BPH-851231MA
KNIK BROADCASTING CORPORATION (hereafter "Knik")	File No. BPH-860102MG
A.A. RADIO PARTNERSHIP, A LIMITED PARTNERSHIP (hereafter "AA")	File No. BPH-860102MM
ALEUT BROADCASTING, INC. (hereafter "Aleut")	File No. BPH-851231MB (DISMISSED HEREIN)
SEWARD RADIO, LTD. (hereafter "Seward")	File No. BPH-860102MF (DISMISSED HEREIN)
ABACUS BROADCASTING (hereafter "Abacus")	File No. BPH-860102MH (DISMISSED HEREIN)
BOBBY DUFFY (hereafter "Duffy")	File No. BPH-860102MI (DISMISSED HEREIN)
GEORGE P. CHARLES (hereafter "Charles")	File No. BPH-860210MN (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station on
Channel 225C (92.9 MHz)
in Anchorage, Alaska

HEARING DESIGNATION ORDER

Adopted: August 1, 1989; Released: August 22, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

PRELIMINARY MATTERS

2. *Minimum Antenna Height.* Pursuant to the changes enacted in the *Report and Order* in BC Docket 80-90, 94 FCC 2d 152 (1983), *modified on reconsideration*, 97 FCC 2d 279 (1984), Class C stations must operate at 100 kW with a minimum antenna height above average terrain (HAAT) of 300 meters. Abacus, Aleut and Duffy all propose to operate with HAATs significantly below the required 300 meter minimum. Abacus proposes to operate with an HAAT of -65 meters from an antenna top-mounted on the existing KASH (FM) tower on Stuck Again Heights; Aleut and Duffy propose to side-mount on the existing KAKM/KTUU television tower in Matanuska-Susitina Borough, specifying HAATs respectively of 195 and 178 meters. Waivers of 47 C.F.R. § 73.211 have been requested. Abacus notes that its site "has the highest ground elevation of any communications site in the Anchorage area," and argues that "there is no site in the Anchorage area which can meet the minimum requirement of 300 meters above average terrain." *Engineering Statement*, at page titled "Site Selection." Aleut also claims that "no existing tower meets the 300-meter minimum," adding that "aeronautical, financial, topographical and other factors virtually ensure that no such tower will be built in the Anchorage area." *Petition for Waiver*, at page 3. Finally, Aleut, citing *Arctic Broadcasting Association*, 37 RR 2d 1027 (1976), argues that an FM station operating above the 300-meter minimum HAAT "would not serve any appreciable population centers that could not be served just as well from the tower that already exists, and which [Aleut] has proposed to serve." *Id.*

3. Pursuant to 47 C.F.R. § 73.3566(a) requests for waiver "shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof." As to the nature and extent of the request, it has long been Commission policy that when an applicant is seeking a waiver of a rule, "it must plead with particularity the facts and circumstances which warrant such action, and give affirmative reasons to justify grant of the waiver in the public interest." *See WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969). Under the immediate circumstances where four of the seven applicants in the instant proceeding have proposed facilities in compliance with the minimum Class C HAAT requirement, the Commission would be hard pressed to find justification for grant of a waiver of 47 C.F.R. § 73.211.[1] *Compare with Locher Development Corporation*, MM Docket No. 85-280 (Mimeo No. 7344, released October 3, 1985), and *Denali Broadcasting Company, Inc.*, MM Docket No. 85-281 (Mimeo No. 7345, released October 3, 1985).[2] Further, none of the requests for waiver provide any aeronautical and/or topographical evidence casting a substantial doubt as to the viability of all of the four proposals complying with the required minimum HAAT. Finally, Aleut's reliance on *Arctic Broadcasting* is misplaced since it offers no evidence that facilities meeting the required minimum HAAT would serve no more people than proposals below the 300-meter requirement. Accordingly, the applications filed by Abacus, Aleut and Duffy will be dismissed as inadvertently accepted for filing.

4. *Seward.* Pursuant to the modified processing procedures instituted by the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19945 (1985), applicants are required to respond to the appropriate section (Section III) of FCC Form 301 regarding certification of their financial ability to construct and operate the station for

three months.[3] A review of all copies of Seward's tendered application reveals that each copy is missing page 5 of the form, which includes the questions concerning its financial certification. Accordingly, Seward's application will be dismissed as inadvertently accepted for tender.

5. *Charles*. On September 8, 1988, the Commission returned Charles' application for failing to respond to Section VII, Item 1 of FCC Form 301 by certifying concerning compliance with the public notice requirement of 47 C.F.R. § 73.3580. In a letter dated October 10, 1988, counsel for Charles petitioned for reconsideration of this action, stating in pertinent part that "[W]e did comply with the public notice requirement of 47 C.F.R. § 73.3580 and have proof of this." Counsel's pleading does not, however, contest the Commission's finding that Charles did not respond to the appropriate item of Form 301 as required by the "hard look" FM processing procedures. *See, Report and Order* in MM Docket 84-750, *Id.* at 19945, and, on this basis, the petition will be denied.

INDIVIDUAL APPLICANTS

6. *Northland*. The engineering data submitted by Northland does not clearly demonstrate that it provides a 3.16 mV/m (70 dBU) signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Northland indicated that "[t]he city of Anchorage has boundaries coextensive with the Borough of Anchorage. Due to the rugged terrain to the east of the proposed site, 70 dBU coverage of the entire Borough is impossible. However, from the proposed antenna location, line-of-sight exists to all of the Anchorage urban area and a signal level of at least 70 dBU is predicted over the entire urban area." *Engineering Exhibit*, at page 3. Our engineering study confirms Northland's statement and, accordingly, waiver of Section 73.315 will be granted.

7. *Knik*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Knik has filed such statement, it is deficient since it does not include any women's organization it proposes to utilize for recruiting purposes. Accordingly, Knik will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

8. *AA*. Our engineering study indicates that AA's proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that AA may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since AA's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the cumulative effects of the proposed operation and all nearby RF sources. If a fence is to be built, the applicant must give the distance from the base of the tower to the fence. Accordingly, AA will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

9. An engineering study of AA's proposal has also revealed that the site elevation as determined by the topographic site map is approximately 760 meters. However, from Sections V-B, V-G and the tower sketch, AA has specified a site elevation of 732 meters. Since the use of either value would not violate any of the Commission's rules and regulations, this is neither a tenderability nor an acceptability defect and may be corrected with an amendment. Accordingly, AA shall be required to submit an amendment within 30 days of the release of this Order to explain or correct the site elevation discrepancy. However, given this discrepancy, an air hazard issue will be specified in this matter.

10. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. AA has not completed Item 4 correctly since it fails to list a residence address for limited partner Michael Cutler. Accordingly, it must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

OTHER MATTERS

11. *Interference to the FCC Anchorage Monitoring Station*. The Commission's Field Operations Bureau has indicated that the facilities proposed by Northland and AA may, if constructed, cause objectionable interference to the FCC Anchorage Monitoring Station. However, the Bureau has further indicated that it will not oppose favorable action on either of the applications provided an appropriate, protective condition is, in the event of grant, attached to Northland or AA's respective construction permit at the conclusion of this proceeding. Accordingly, an appropriate condition will so be attached.

12. *Air Hazard*. The Federal Aviation Administration has determined (FAA Advisory 86-AAL-5-OE) that Knik's proposed site will be a hazard to air navigation. Accordingly, an issue will be specified and the FAA made a

party to the proceeding. As noted in paragraph 9 hereinabove, the site elevation discrepancy with respect to AA requires the specification of an air hazard issue.

13. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to AA in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by AA and Knik would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That the applications filed by Aleut, Abacus and Duffy ARE RETURNED as inadvertently accepted for filing.

17. IT IS FURTHER ORDERED, That the application filed by Seward IS DISMISSED as inadvertently accepted for tender.

18. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Charles IS DENIED.

19. IT IS FURTHER ORDERED, That Northland's request for waiver of the coverage provisions of 47 C.F.R. § 73.315 IS GRANTED.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Knik shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

21. IT IS FURTHER ORDERED, That, in accordance with paragraph 8 hereinabove, AA shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

22. IT IS FURTHER ORDERED, That, in accordance with paragraph 9 hereinabove, AA shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order clarifying its site elevation.

23. IT IS FURTHER ORDERED, That AA shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

24. IT IS FURTHER ORDERED, That the following protective condition shall be appended to and become part of any construction permit issued as a result of this proceeding or subsequent station license granted to either Northland or AA:

> "The authority granted herein is subject to the condition that, in the event of interference to monitoring, direction finding, or related operations at the Federal Communications Commission's Anchorage, Alaska Monitoring Station, caused by either spurious or harmonic radiation, the permittee shall take such immediate corrective action as is necessary to eliminate the interference. This shall include responsibility for furnishing, installing, and adjusting filter circuits, shielding, or other corrective devices which may be necessary to minimize harmonic or spurious radiation. If these measures fail to eliminate the interference, the permittee shall either immediately reduce the power to the point of no interference, or cease operation."

25. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

26. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Despite the Federal Aviation Administration's recent determination (FAA Advisory 86-AAL-5-OE) that Knik's proposed site near the KTAK tower would constitute a hazard to air navigation, Knik is not precluded from seeking approval of a new site from which compliance with § 73.211 is possible. *See, e.g., Orlando FM Group Limited Partnership,* 2 FCC Rcd 4691, 4696 (1987).

[2] In both proceedings, the Commission recognized that all applicants in the respective proceedings requested facilities below the required minimums, and the prevailing applicant would eventually be downgraded to Class C2 on March 1, 1987 pursuant to the *Report and Order* in BC Docket 80-90, *supra*.

[3] "It is pointless to grant an authorization of facilities that cannot be built. It is likewise pointless to process an application where a response to certification of financial ability is not provided." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

CHILDRESS RADIO COMPANY — File No. BP-870331BK
WYDK, Yadkinville, North Carolina
Has: 1480 kHz, 1 kW, DA-D
Req: 1470 kHz, 0.7 kW, 2.5 kW-LS, DA-N, U

TRIAD NETWORK, INC. — File No. BP-870928AA
Greensboro, North Carolina
Req: 1470 kHz, 3.5 kW, 5 kW-LS, DA-2, U

GREENSBORO COMMUNICATIONS — File No. BP-870429AE (Formerly BP-870331CC)
Greensboro, North Carolina (DISMISSED HEREIN)
Req: 1470 kHz, 3.4 kW, 5 kW-LS, DA-2, U

For Construction Permits

HEARING DESIGNATION ORDER

Adopted: August 1, 1989; Released: August 22, 1989

By the Chief, Audio Services Division

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration: (i) the above-captioned mutually exclusive applications;[1] (ii) a petition to deny the Childress Radio Company ("Childress") application filed by Triad Network, Inc. ("Triad");[2] (iii) a petition to deny the Triad application filed by Childress; and (iv) related pleadings.

2. *Triad Network, Inc. application.* In its petition to deny, Childress Radio Company alleges that Triad's proposed site would create objectionable interference to the nighttime limits of stations WRGA, Rome, Georgia and WRBD, Pompano Beach, Florida. Specifically, Childress alleges that Triad's proposal violates 47 C.F.R. Section 73.37(a) because the proposed operation would result in the overlap of signal contours with WRGA and WRBD.[3] Additionally, Childress alleges that Triad's proposal violates 47 C.F.R. Section 73.37(e) by failing to assure that objectionable interference would not result to any authorized station as determined pursuant to 47 C.F.R. Section 73.182(1). In a supplement to its petition to deny filed May 4, 1989, Childress contends that its arguments are "given new force" by virtue of the Commission's *Notice of Proposed Rule Making* ("NPRM") in MM Docket 89-46, FCC 89-71, released March 17, 1989. Childress asserts that the Commission proposes to prohibit new applications filed subsequent to a deletion that would result in prohibited overlap of daytime contours to the remaining stations.

3. As Triad correctly observes in its opposition, although it filed an application for a construction permit for a new station, the application was for the recently deleted license and frequency of former Station WBIG(AM). With respect to such stations, the Commission's long standing practice has been to "grandfather" their radiation and protection rights for a period of one year following deletion, while, at the same time, accepting applications for replacement stations. The fact that the Commission may alter this policy in the future, as Childress contends in its Motion to Strike filed May 26, 1989, does not mean that such policy should be applied retroactively. Therefore, because the Triad application is subject to the same radiation and protection rights of former Station WBIG(AM), and since the Triad application does not propose any increase in signal toward either WRGA or WRBD, Childress' allegations are without merit. Accordingly, its petition must, in all respects, be denied.

4. The engineering portion of the Triad application is missing site photos. This omission must be corrected by an amendment filed with the presiding Administrative Law Judge within thirty (30) days of the release of this Order.

5. The proposed operation for Triad violates 47 C.F.R. Section 73.24(j) since the proposed nighttime interference-free contour does not cover the entire city limits of Greensboro, North Carolina. It should be noted that when the application was originally filed, the proposed nighttime interference-free contour of 3.15 mV/m provided full coverage to Greensboro, North Carolina. However, during the interim time, the Commission has issued show cause orders to the majority of daytime broadcasters on 1470 kHz to allow them to add nighttime service. In issuing the show cause orders, the Commission inadvertently failed to provide protection to the Greensboro application and, consequently, increased the nighttime interference-free contour from 3.5 mV/m to 6.5 mV/m. Due to the Commission's failure to consider the Triad application when it issued the show cause orders, Triad's proposed nighttime interference-free contour of 6.5 mV/m does not provide full city coverage to Greensboro. Accordingly, the Commission on its own motion shall waive 47 C.F.R. Section 73.24(j) as applied to Triad in this proceeding.

6. Except as indicated by the issues specified below, all applicants are qualified to construct and operate as proposed.[4] However, since the proposals are for different communities, we will specify an issue to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal or combination of proposals, would better provide a fair, efficient, and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposal prove warranted.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the areas and populations which would gain or lose primary aural service from the proposal of Childress Radio Company and

the availability of other primary service to such areas and populations, (b) the areas and populations which would receive primary aural service from the Triad Network Inc. proposal and the availability of other primary service to such areas and populations, and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient and equitable distribution of radio service.

2. To determine in the event it is concluded that a choice between the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That, for the reasons set forth hereinabove, the Greensboro Communications application IS DISMISSED.

9. IT IS FURTHER ORDERED, That, for the reasons set forth hereinabove, the petition to deny filed by Triad Network, Inc. against Childress Radio Company IS DISMISSED.

10. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 2-3 hereinabove, the petition to deny filed by Childress Radio Company against Triad Network, Inc. IS DENIED.

11. IT IS FURTHER ORDERED, That, in accordance with paragraph 4 hereinabove, Triad Network, Inc. file an amendment with the presiding Administrative Law Judge within thirty days of the release of this Order.

12. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 5 hereinabove, 47 C.F.R. Section 73.24(j) IS WAIVED with respect to Triad Network, Inc.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants shall, pursuant to 47 C.F.R. Section 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. Section 311(a)(2) and 47 C.F.R. Section 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. Section 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The Greensboro Communications application is hereby dismissed, as applicant has failed to render its filing fee which was requested in a letter dated September 2, 1988 from the Chief of the AM Branch and in a Fee Program Billing Statement dated September 2, 1988 from the Fee Section.

[2] Although Triad alleges that Childress is not financially qualified, its petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications: Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

[3] Childress's reference to contour overlap in violation of 73.37(a) is not valid, as this alleges that prohibited daytime groundwave overlap exists, while their own engineering showings address only the subject of nighttime skywave interference problems. The term "overlap" and Section 73.37(a) do not apply in Class III co-channel nighttime situations. No engineering showing has been submitted by Childress depicting a daytime incompatibility with WRGA or WRBD.

[4] Operation with the facilities specified herein is subject to modification, suspension or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Final Acts of the ITU Administrative Conference on Medium Frequency Broadcasting in Region 2 Rio de Janeiro 1981 and to bilateral and other multilateral agreements between the United States and other countries.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-364

In the Matter of

Amendment of Section 73.202(b), RM-6796
Table of Allotments,
FM Broadcast Stations.
(Plantersville, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 7, 1989; Released: August 23, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Carocom Media (petitioner) requesting the allotment of Channel 253A to Plantersville, South Carolina, as the community's first local FM service.[1] Petitioner states that it will apply for the channel, if allotted. Channel 253A can be allotted to Plantersville in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.6 kilometers (3.4 miles) east to avoid a short-spacing to Station WWKT-FM, Channel 252A, Kingstree, South Carolina.[2]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Plantersville is not listed in the U.S. Census.[3] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Plantersville is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 253A to Plantersville, South Carolina, since it could provide it with a first local FM service, if Plantersville is ultimately found to be a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Plantersville, South Carolina	–	253A

4. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the affected applicant for Channel 255C2 at McClellanville, South Carolina, as follows: McClellanville Associates, 5956 C Hamilton Road, Columbus, Georgia 31908.

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 16, 1989,** and reply comments on or before **October 31, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William J. Pennington, III
Carocom Media
5519 Rockingham Road-East
Greensboro, North Carolina 27407
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See* Certification *That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The petitioner originally requested the allotment of Channel 300A to Plantersville. However, this allotment conflicts with the request of G & M Communications to allot Channel 300C2 to Bucksport, South Carolina (RM-6511). Therefore, we have substituted Channel 253A for consideration herein.

[2] This site restriction will also avoid a short-spacing to all of the pending applications for Channel 255C2 at McClellanville, South Carolina, with the exception of ARN-880606OF filed by McClellanville Associates. Therefore, we will serve a copy of this *Notice* on McClellanville Associates and if the channel is ultimately allotted, it will be permitted to amend its application to a non-short-spaced site without loss of cut-off protection.

[3] We note that Plantersville is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 150 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-366

In the Matter of

Amendment of Section 73.202(b), RM-6824
Table of Allotments,
FM Broadcast Stations.
(Knoxville, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 7, 1989; Released: August 23, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dominion Publishing, Inc., licensee of Station KTAV-FM, and Leighton Enterprises, Inc., licensee of Station KRLS ("petitioners"), requesting the substitution of Channel 221C3 for Channel 221A at Knoxville, Iowa. Petitioners operate their respective operations as share-time stations and request that their licenses be modified to specify operation on the higher powered channel. Petitioners state that they will apply for the channel, if allotted.

2. Channel 221C3 can be allotted to Knoxville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] In addition, the 1 mV/m contour of a Channel 221C3 station at Knoxville does not lie within the Grade B contour of any TV Channel 6 station. Therefore, no showing concerning the impact of this allotment on the availability of noncommercial educational service is necessary. As requested, we also propose to modify petitioners' licenses for Stations KTAV-FM and KRLS to specify operation on the higher powered channel. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 221C3 at Knoxville or require the petitioners to demonstrate the availability of an additional equivalent channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 221C3 for Channel 221A at Knoxville, Iowa, since it could permit Stations KTAV-FM and KRLS to increase their coverage areas. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Knoxville, Iowa	221A	221C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 16, 1989,** and reply comments on or before **October 31, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerrold Miller, Esq.
Miller & Fields, P.C.
P.O. Box 33003
Washngton, D.C. 20033
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-19-12 and West Longitude 93-05-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-365

In the Matter of

Amendment of Section 73.202(b), RM-6811
Table of Allotments,
FM Broadcast Stations.
(Ottumwa, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 7, 1989; Released: August 23, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Gillbro Communications Limited Partnership (petitioner) requesting the substitution of Channel 224C3 for Channel 224A at Ottumwa, Iowa, and the modification of its license for Station KTWA to specify operation on the higher powered channel.

2. Channel 224C3 can be allotted to Ottumwa in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.1 kilometers (5.0 miles) northwest to avoid a short-spacing to the pending application of Station KGRC, Hannibal, Missouri (BPH-890202IC) and to accommodate petitioner's desired transmitter site.[1] As requested, we will also propose to modify petitioner's license for Station KTWA to specify the higher powered channel. In accordance with Section 1.420(g) of the Commission's rules, we will not accept competing expressions of interest in use of Channel 224C3 at Ottumwa or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 224C3 for Channel 224A at Ottumwa, Iowa, since it could enable Station KTWA to increase its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ottumwa, Iowa	224A, 249A	224C3, 249A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 16, 1989,** and reply comments on or before **October 31, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Vincent A. Pepper, Esq.
Barbara R. Merlie, Esq.
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-05-00 and West Longitude 92-27-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-367

In the Matter of

Amendment of Section 73.202(b), RM-6835
Table of Allotments,
FM Broadcast Stations.
(Klondike, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 7, 1989; Released: August 23, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sandlapper Broadcasting (petitioner) requesting the allotment of Channel 253A to Klondike, South Carolina, as its first local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 253A can be allotted to Klondike in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies ". . .among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Klondike is not listed in the U.S. Census. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Klondike is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by soliciting comments on the allotment of Channel 253A to Klondike as its first local service and its status as a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Klondike, South Carolina	--	253A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 16, 1989,** and reply comments on or before **October 31, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Toni T. Rinehart
Sandlapper Broadcasting
2557-E Mountain Lodge Circle
Birmingham, Alabama 35216
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 33-41-27 and West Longitude 79-07-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-413

In the Matter of

Amendment of Section 73.202(b), RM-6370
Table of Allotments,
FM Broadcast Stations.
(Ringgold and Tunnel Hill,
Georgia)[1]

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1989; Released: August 23, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of James E. Price ("Price"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5249 (1988), proposing the allotment of Channel 229A to Ringgold, Georgia, as that community's second local FM service. Price filed comments restating his interest in the channel, if allotted. B. Edward Tuten ("Tuten") filed comments and a counterproposal requesting allotment of Channel 229A to Ringgold, Georgia, on the condition that Channel 270A is reassigned from Ringgold to Tunnel Hill, Georgia. Price and Marshall M. Bandy ("Bandy") filed reply comments. No other comments were received.

2. Tuten, in his counterproposal, supports the allotment of Channel 229A to Ringgold, Georgia, on the condition that Channel 270A is reassigned from Ringgold to Tunnel Hill, Georgia, as that community's first FM allotment. Tuten states that Channel 229A cannot be allotted to Tunnel Hill in compliance with the minimum distance separation requirements, but that Channel 270A can be allotted to Tunnel Hill in compliance with the Rules. Tuten believes his proposal is in the public interest, since it will result in both Ringgold, Georgia, and Tunnel Hill, Georgia, each having a local radio station.

3. In reply comments, Price states that he is interested in the allotment of Channel 229A to Ringgold, Georgia, only as its second FM service.

4. In reply comments, Bandy notes that in MM Docket No. 87-581 his application to construct and operate a new FM station at Ringgold, Georgia, on Channel 270A was granted.[2] The reallotment of Channel 270A from Ringgold to Tunnel Hill would require modification of Bandy's construction permit.

5. It is Commission policy not to reallot a channel in which interest has been expressed, absent a sufficient reason to do so. *See Fond du Lac and Sheboygan, Wisconsin*, 55 RR 2d 502 (1984). While we believe Tunnel Hill is a community which the Commission could consider as meriting its own local FM service, we are unable to find that its lack of local service is a sufficiently overriding reason to overturn the Commission's general policy of retaining channel allotments at communities where an interest has been expressed, nor would it justify the initiation of show cause proceedings to modify Bandy's construction permit.

6. We believe the public interest would be served by the allotment of Channel 229A to Ringgold, Georgia, as a second local FM service to the community. Channel 229A can be allotted to Ringgold, in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.3 kilometers (3.9 miles) west to avoid a short-spacing to Station WLJA(FM), Channel 228A, Ellijay, Georgia.[3]

7. Accordingly, IT IS ORDERED, that the counterproposal filed by B. Edward Tuten to reassign Channel 270A from Ringgold to Tunnel Hill, Georgia IS DENIED.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Ringgold, Georgia	229A, 270A

9. The window period for filing applications will open on **October 11, 1989,** and close on **November 9, 1989.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Tunnel Hill has been added to the caption.

[2] Marshall M. Bandy was granted a construction permit (BMPH-880831ID) on December 19, 1988, for Channel 270A at Ringgold, Georgia.

[3] The coordinates for this allotment are North Latitude 34-54-01 and West Longitude 85-10-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-35

In the Matter of

Amendment of Section 73.202(b),	RM-5134
Table of Allotments,	RM-5377
FM Broadcast Stations.	
(Trinity and Rogersville, Alabama)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 3, 1989; Released: August 23, 1989

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for reconsideration filed on behalf of Radio South, Inc. ("RSI"), licensee of Station WTUG(FM), Channel 224A, Tuscaloosa, Alabama, of the *Report and Order* issued herein, 1 FCC Rcd 63 (1986), which, *inter alia*, allotted Channel 223A to Trinity, Alabama, as that community's first local broadcast service. Radio Hartselle ("RH"),[1] Radio Trinity ("Trinity"), and R & B Communications, Inc. ("R&B")[2] each filed opposition comments, to which RSI responded.

2. RSI seeks reconsideration of the *Report and Order*, *supra*, and requests the substitution of Channel 291A for Channel 223A at Trinity,[3] to permit the simultaneous consideration of a separately filed rule making proposal in MM Docket No. 87-451 to substitute Channel 223A for Channel 225A at Cordova, Alabama. The Cordova substitution is sought to permit RSI to upgrade Station WTUG(FM) from Channel 224A to Channel 225C2.

3. The Commission adopted a *Report and Order* in MM Docket No. 87-451, 3 FCC Rcd 6849 (1988), which culminated in the grant of RSI's proposal without requiring the substitution of channels at Trinity. Therefore, in view of the Commission's favorable action in that proceeding, RSI's petition for reconsideration has been rendered moot.

4. In consideration of the above, IT IS ORDERED, That the petition for reconsideration filed by Radio South, Inc., in the above-captioned proceeding IS DISMISSED AS MOOT.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] RH is the petitioner for Channel 291A at Hartselle, AL in MM Docket No. 87-451 (RM-5631).

[2] The latter two commentors are each applicants for Channel 223A at Trinity, AL.

[3] The allotment of Channel 230A to Rogersville, Alabama, is not challenged by RSI.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. CSG-89-103-P/L

Application for authority to construct and operate international earth station facilities at Tulsa, Oklahoma for provision of INTELSAT Business Services.

ORDER AND AUTHORIZATION

Adopted: August 15, 1989; Released: August 23, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 14, 1989, by GTE Spacenet Corp. (GTE) requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Tulsa, Oklahoma, for the provision of INTELSAT Business Services (IBS). The application was placed on public notice on June 28, 1989. No comments were received. GTE has been granted blanket authority to establish and operate channels of communications between the U.S. and various international points for the provision of IBS.[1]

2. The proposed earth station will consist of a 9-meter antenna which shall meet INTELSAT Standard F-3 technical parameters and communicate with an appropriate INTELSAT satellite in the Atlantic Ocean Region (AOR) operating in the 5925-6210 MHz and 6243-6425 MHz transmitting frequency bands and the 3700-4200 MHz receiving frequency band. The earth station will be constructed on customer premises at Tulsa, Oklahoma, and will be used to provide a full range of IBS services.

3. GTE's legal, financial and technical qualifications to construct and operate the proposed earth station are established. GTE provides various international services and has been authorized to construct and operate other earth station facilities for IBS services.[2] GTE has completed the necessary frequency coordination for the limited frequency bands specified in paragraph number two.

4. The proposed earth station is consistent with the Commission's policy on the ownership and operation of U.S. international earth stations[3] and its scope of operation will be the same as that permitted by the Commission in previous IBS authorizations.[4] We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

5. Upon consideration of the application, we find that authorization of the requested earth station facilities to provide IBS would serve the public interest.

6. Accordingly, IT IS ORDERED pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-89-103-P/L is GRANTED, and GTE is authorized to construct and operate the proposed 9-meter C-band earth station at Tulsa, Oklahoma, to provide IBS and related digital video services.[5] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

7. The Commission's temporary authorization granted July 11, 1989, is hereby terminated.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] GTE Spacenet Corp., Mimeo No. 5606, released July 7, 1986, File No. I-T-C-86-097.

[2] GTE Spacenet Corp., DA 87-315 released March 26, 1987, File No. CSG-87-022-P/L.

[3] Earth Station Ownership, 100 FCC 2d 250 (1984).

[4] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[5] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYCOM INFORMATION SERVICES, INC. File No. I-T-C-89-112

Application for authority to operate as an international resale carrier.

EQUICOM COMMUNICATIONS, INC. File No. I-T-C-89-114

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 15, 1989; Released: August 23, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on May 19, and 22, 1989, by NYCOM Information Services, Inc. (NYCOM) and Equicom Communications, Inc. (Equicom), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on June 7, 1989. No comments were received.

2. The applicants are non-dominant domestic resale common carriers. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by NYCOM and Equicom.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-112 and I-T-C-89-114 ARE GRANTED, and

a. NYCOM is authorized to provide international switched voice services by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 betweeen the U.S. and those points listed in those tariffs; and

b. Equicom is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. Nos. 1 and 2 between the U.S. and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

MCI INTERNATIONAL, INC. I-T-C-89-106

For authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in a digital submarine cable system between and among Hong Kong, Japan and Korea

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: August 15, 1989; Released: August 23, 1989

By the Chief, International Facilities Division:

1. On May 2, 1989, MCI International, Inc. (MCII) filed the above-captioned application requesting authority to acquire and operate additional half interests in 24 minimum assignable units of ownership (MAUOs) in the Japan-Korea portion of the Hong Kong, Japan and Korea digital submarine cable system (H-J-K cable system).[1] The application was placed on public notice May 10, 1989. No comments were received. We grant the application for the reasons set forth below.

2. MCII states it is currently authorized to acquire and operate up to 36 half-MAUOs in the H-J-K cable system. Of this, a one-half interest is in 30 MAUOs in the Japan-Hong Kong fiber pair and another one-half interest is in six MAUOs in the Japan-Korea fiber pair of the H-J-K cable system.[2]

3. MCII bases its present request for an additional 24 MAUOs on an increase in projected traffic volumes. The end result of the acquisition of additional capacity will be an increase in MCII's ownership interest from six half-MAUOs to 30 half-MAUOs in the Japan-Korea portion of the cable. MCII proposes to use the facilities covered by this modification request to supplement its existing facilities in providing the services it presently furnishes, or may subsequently furnish.

4. MCII states the additional capacity of 24 half-MAUOs will be acquired at an estimated total capital cost of $408,000. The total cost of the H-J-K cable system is estimated at $185 million of which MCII will bear approximate .79 percent of the cost.[3] MCII states it will furnish its regularly authorized services using the facilities covered by this application in accordance with tariffs on file, or to be filed.

5. Upon review of the application, we find MCII's plan to acquire and activate additional half interests in 24 MAUOs in the Japan-Korea portion of the H-J-K cable system is operationally sound. The proposed acquisition will better allow MCII to serve its customers and facilitate the full use of the H-J-K cable system.

6. We therefore conclude that it would serve the public interest to allow MCII to acquire and activate additional half interests in 24 MAUOs in the Japan-Korean portion of the H-J-K cable system, increasing MCII's total participation in that segment of the cable to 30 MAUOs.

7. Accordingly, IT IS ORDERED that application File No. I-T-C-89-106 IS GRANTED pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214 and Section 63.01 of the Commission's Rules and Regulations CFR 63.01, and MCII is authorized to acquire and activate additional half-interests in 24 MAUOs of the Japan-Korea portion of the H-J-K cable system.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The application is filed pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules and Regulations.

[2] Memorandum, Opinion, Order and Authorization, File No. I-T-C-88-124, 3 FCC Rcd 4346 (1988).

[3] *See* Schedule B, H-J-K Amendatory Agreement No. 1 (October 19, 1988), H-J-K Construction and Maintenance Agreement.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS & WATS Market Structure

Average Schedule Companies
City of Brookings Remand Proceeding
On Motion for Release of Data

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 23, 1989

By the Commission:

1. On October 20, 1988, the National Telephone Cooperative Association (NTCA) filed a Motion for Release of Data seeking disclosure of information provided to the Commission by the National Exchange Carrier Association (NECA). The Commission had requested the data for purposes of complying with the court's decision in *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153 (D.C. Cir. 1987), which remanded the Commission's decision in *In the Matter of MTS and WATS Market Structure: Average Schedule Companies*, 103 FCC 2d 1017 (1986). A central issue in the remand proceeding concerns the appropriate average schedules for calculating compensation for companies that are not compensated on the basis of their individual costs. ICORE, Inc. (ICORE), a consulting firm representing thirteen local exchange carriers (LECs), opposed NTCA's Motion for Release of Data. The Common Carrier Bureau treated the Motion as an FOIA request and granted NTCA's request in part.[1] Before the Commission are a Petition for Stay and Petition for Reconsideration of the Bureau's decision filed by ICORE and an Opposition to Petition for Stay filed by NTCA.[2] For the reasons set forth below, we deny the Petition for Reconsideration.

BACKGROUND

2. The data at issue was submitted by NECA in response to questions posed by the Chief, Common Carrier Bureau and consists of documents containing company-specific information concerning the number of access lines, messages per line, settlements paid from the common line pool, and the common line recovery ratio of four LECs. At the time of the data's submission, ICORE, which represents all four LECs, requested that the Commission accord the data confidential treatment. With the exception of the name of a customer of one of the LECs, the Bureau, however, concluded that the data was not encompassed within Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Accordingly, the Bureau denied the request for confidentiality in part. ICORE subsequently filed an application for review of this decision but withdrew its appeal when the Bureau, on its own motion, reconsidered its decision and decided to release the documents with the names of the four LECs masked. Parties to the remand proceeding were then permitted to review and comment upon the data.

3. In its subsequent Motion for Release of Data, NTCA contended that the names of the four LECs were relevant to the resolution of issues in the remand proceeding and requested their disclosure.[3] In particular, NTCA asserted that the prior system of settlements for carrier common line costs had resulted in some LECs receiving settlements that greatly exceed that carrier's unseparated common line costs of service. As the remand proceeding is concerned, *inter alia*, with the question of how the common line settlements should be distributed, ICORE argues that the Commission must determine whether the former system had led to abuses and, if so, the extent of those abuses. NTCA argues that the data it seeks is relevant to that issue because release of the company names would enable parties to compare individual company settlements with individual company costs, as obtained from other public information,[4] and determine whether these four LECs had received settlements that greatly exceeded their expenses. ICORE opposed the Motion for Release of Data, arguing that the Motion was an untimely petition for reconsideration of the Bureau's prior order directing release of the data with the names masked. ICORE also asserted that disclosure of the companies names would not advance the issues in the remand proceeding and would unnecessarily delay the conclusion of that proceeding.

4. In ruling on the Motion, the Bureau rejected ICORE's procedural argument. The Bureau concluded that because NTCA was entitled to file an FOIA request for this data at any time, no purpose would be served by dismissing NTCA's Motion as an untimely petition for reconsideration. In order to address the issues raised by the Motion quickly and efficiently, the Bureau, therefore, chose to treat it as an FOIA request. As it had previously concluded with respect to this data, the Bureau determined that the data was not encompassed within FOIA Exemption 4 and, therefore, was subject to the FOIA's disclosure mandate.[5] The Bureau concluded that release of the data would not likely result in competitive harm because LECs "essentially operate as monopolies within their service areas." Further, to the extent competition existed because a customer located in more than one exchange could select among different carriers for purposes of purchasing interstate access service, the Bureau concluded that the most significant information affecting competition -- the rates charged for such lines -- was already available in publicly filed tariffs. Accordingly, the Bureau concluded that disclosure of the names of the four LECs in conjunction with each LEC's data indicating volume of traffic and the amount of its compensation could not assist other LECs.

THE PETITION FOR RECONSIDERATION

5. ICORE's petition for reconsideration raises two arguments. First, ICORE contends that because NTCA did not expressly invoke the FOIA, the Bureau should have treated NTCA's Motion as an untimely and improper petition for reconsideration of the Bureau's disposition of

ICORE's request for confidentiality. ICORE asserts that the Bureau's treating NTCA's Motion as an FOIA request "blind-sided" it with respect to the FOIA issues and precluded ICORE from having an opportunity to respond fully to NTCA's Motion under the Commission's FOIA rules. Second, ICORE argues that the Bureau's decision to disclose the names of the four LECs violated the confidentiality "agreement" the Bureau had previously made with the ICORE companies. As a consequence, ICORE maintains that it has been denied the opportunity for Commission review of its application for review of the Bureau's denial of its original request for confidentiality. ICORE considers this particularly unfair as the Bureau's decision granting NTCA's Motion relied upon the same reasoning contained in the Bureau's decision denying the request for confidentiality. ICORE requests that, at the very least, its earlier application for review should be reinstated.

6. Most of NTCA's Opposition focuses on its opposition to ICORE's stay request. NTCA also suggests that much of the relevant information, especially the identity of one of the LECs at issue, cannot be considered confidential financial information because the most significant data pertaining to that company is already a matter of public record. In particular, NTCA contends that recent public correspondence between Congressman Tauke and Chairman Patrick and between James McKenna of Northwest Iowa Telephone Company and Mr. Joseph Naset of NECA strongly suggest that Northwest Iowa is company 3 reflected in the documents. NTCA notes that Northwest Iowa is an ICORE company and that much of the information concerning Northwest Iowa in this correspondence is strikingly similar to the ICORE information on company 3. Additionally, NTCA argues that ICORE has argued throughout the *City of Brookings* remand proceeding that no evidence exists that any LEC has overrecovered its costs under the old settlement system. Accordingly, NTCA believes that the public interest warrants releasing the identities of the four companies so that cross references to other publicly available data could be made that would provide useful information on the overcompensation issue.

DISCUSSION

7. For the reasons that follow, we deny ICORE's petition for reconsideration.[6] We disagree with ICORE's contention that the Bureau should have treated NTCA's Motion as an untimely petition for reconsideration of its ruling on the confidentiality request. The FOIA is the relevant statute governing the Commission's obligation to disclose the information at issue. Therefore, we conclude that the Bureau properly exercised its discretion when it determined that NTCA's Motion should be treated as an FOIA request. Additionally, we conclude that the Bureau's earlier disposition of ICORE's unopposed request for confidentiality did not preclude the Bureau from subsequently disclosing the matter in response to a request for disclosure. The Bureau *Order* setting forth its procedural resolution of this matter was expressly grounded on a premise that "no party has heretofore requested that the names of specific companies be directly, and identifiably, associated with the data that NECA provided and that no party has stated that such information would facilitate analysis or the preparation of comments."[7] Clearly, that premise was altered when NTCA filed its Motion asking to inspect the names masked from the documents. Moreover, the Bureau's decision could not have purported to override the statutory disclosure requirements of the FOIA. Therefore, in light of NTCA's subsequent request for this information, the Bureau's prior determination could not have been binding. Under these circumstances, we find that the Bureau's reversal of its prior ruling was justified.[8] As to any possible unfairness resulting from the withdrawal (as part of the settlement) of ICORE's earlier application for review, any unfairness will be adequately rectified if we consider herein the Exemption 4 arguments raised in that application for review.

8. The principal question in the application for review concerns whether the data at issue should be considered confidential as that term is used in FOIA Exemption 4. *See* footnote 5, *supra*. Generally speaking, financial information is confidential if its disclosure would either impair the Government's ability to obtain this information in the future or cause substantial competitive harm to the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d at 770. In order to satisfy the second prong of this test, the party claiming confidentiality must demonstrate actual competition and a likelihood of substantial competitive injury if the information is disclosed. *See Gulf & Western Industries v. United States*, 615 F.2d at 530.

9. ICORE contends that both prongs of Exemption 4 are applicable to this data. With respect to the first prong, ICORE asserts that if this information is released, small telephone companies will be reluctant to furnish such data to NECA and, thus, ultimately to the Commission. ICORE adds that the Commission has never before publicly released this kind of information. As for the second prong, ICORE asserts that actual competition exists among the LECs for business from the interexchange carriers for certain kinds of long-distance access. ICORE further argues that public disclosure of access lines, messages per line, and common line settlement information would reveal to the other LECs significant information with respect to these competitive operations. In particular, ICORE contends that information concerning the volume of usage of a particular business customer of an LEC and the compensation therefor "would give competitors an unfair competitive advantage in seeking current and future access business." *ICORE Application for Review* at 8. ICORE adds that as a small business it cannot be expected to provide detailed, elaborate evidence in order to substantiate its claim of confidentiality because such evidence would be too expensive for a small business to produce.[9]

10. As to the first prong of Exemption 4, we concur in the Bureau's analysis of this issue in its original denial of ICORE's request for confidentiality.[10] Since the Commission has ample authority to require submission of the pertinent information under sections 1, 4(i) and (j), 201 - 205, and 403 of the Communications Act, the Bureau rejected any claim that denial of confidential treatment would impair the Commission's ability to obtain similar information. Further, none of the other LECs for whom NECA submitted this information expressed any concern regarding its public disclosure.[11] Thus, there appears to be little evidence that other LECs will be reluctant to submit this kind of information absent a promise of confidential treatment. Moreover, as the LECs must disclose this information to NECA before they may participate in the

settlement process, there is a strong incentive to cooperate. Accordingly, we consider this argument to be without merit.

11. We are similarly unpersuaded by ICORE's arguments with respect to the second prong of Exemption 4. We recognize that while the LECs are monopolies in many respects, competition does exist among them. For example, they compete to obtain business from interexchange carriers and large businesses that may be able to select from among several local exchange carriers in obtaining access to the interstate telephone network. We agree with the Bureau, however, that revealing the number of access lines, messages per line that are carried during a certain period of time, and the amount of common line settlements for any particular LEC would not assist other LECs in the competitive process. Even if this information could be used to discern whether a particular LEC may have a major customer who generates a substantial amount of traffic, neither the identities of any such customers nor the precise volume of traffic of any particular customer is disclosed by the data in question.[12] Furthermore, to the extent such high volume customers exist, whether they are interexchange carriers or companies located in several exchanges, their identities are likely to be well known to the other LECs.[13] In short, we perceive no likelihood of substantial competitive harm from disclosure of this data.[14]

12. Accordingly, ICORE, Inc.'s petition for reconsideration IS DENIED.[15] Pursuant to the provisions of section 0.459(g), ICORE, Inc. will be accorded five working days from the release date of this order in which to seek a judicial stay.

13. The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *In the Matter of MTS and WATS Market Structure: Average Schedule Companies City of Brookings Remand Proceeding On Motion for Release of Data*, 3 FCC Rcd 5602 (Com. Car. Bur. 1988).

[2] In accordance with the Commission's rules, the Bureau has stayed release of the information requested by NTCA pending disposition of ICORE's timely-filed petition for reconsideration. *See* 47 C.F.R. § 0.461(h). Thus, in effect, ICORE's petition for stay was granted. The Bureau referred the Petition for Reconsideration to the Commission for its resolution.

[3] NTCA also requested that the Commission make available any other information "not yet on the record or released for public review" which has been generated in the remand proceeding and is relevant to the issue of overcompensation. The Bureau denied this request as "unreasonably vague." NTCA has not challenged this aspect of the decision.

[4] Such information would be available from the Rural Electrification Association and various state commissions.

[5] Exemption 4 protects from disclosure trade secrets and commercial or financial information that is obtained from a person and that is privileged or confidential. *Gulf & Western Industries v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979). The only issue before the Bureau concerned whether the financial information was confidential. Generally, information is confidential "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

[6] In order to resolve NTCA's application for review of its request for confidentiality and to address the issues NTCA has raised in a timely manner so that the *City of Brookings* remand proceeding may proceed, the Bureau referred the petition for reconsideration to the Commission.

[7] *City of Brookings Remand Proceeding*, DA 87-1761, released December 4, 1987 (*Order*).

[8] Indeed, we note that under the Commission's own rules, a Commission ruling granting a request for confidentiality does not preclude the Commission from granting a subsequent disclosure request "in light of the facts presented." 47 C.F.R. § 0.461(f)(4).

[9] ICORE cites *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 681 (D.C. Cir. 1976); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

[10] The Bureau's decision granting NTCA's Motion for release of data did not expressly address the first prong of Exemption 4.

[11] Further, similar information is routinely disclosed in tariff proceedings pursuant to sections 61.38 and 61.39 of the Commission's rules.

[12] As previously noted, to the extent that this information does contain the name of one customer, the Bureau decision disposing of ICORE's request for confidentiality concluded that the customer's name should be masked. NTCA has not challenged that decision, and we will continue to protect the identity of that customer. Further, to the extent that ICORE suggests that disclosure of this information will competitively harm its customers, we find no support for this argument in the record. As noted, the documents do not indicate how much traffic is attributable to any particular customer.

[13] With respect to ICORE's argument that we cannot expect it to provide elaborate evidence of competitive harm because of the economic impact producing such evidence could have on a small business, we note that our decision is not only based on ICORE's failure to provide sufficient factual evidence of substantial competitive harm but also on ICORE's failure to suggest even a plausible scenario of substantial competitive harm.

[14] Even if we had concluded that disclosure of this information could result in substantial competitive harm to an LEC, we would release this information under our discretionary authority to release information that is not subject to the FOIA mandatory disclosure requirements. We agree with NTCA that this information is relevant to an important issue in this proceeding; namely, whether the former system of settlement distribution resulted in some LECs receiving settlements that far exceeded their costs of providing the services. The Trade Secrets Act, 18 U.S.C. § 1905, would not be an impediment to our exercising our discretion to release the information. Such disclosure is authorized under section 0.457(d)(2)(i) of our rules and thus is "authorized by law" as provided in the Trade Secrets Act. *See generally, Northern Television, Inc. v. FCC, Civil Action No. 79-3468 (D.D.C. April 18, 1980).*

[15] ICORE requests that we return these documents to it pursuant to section 0.459(e) of our rules should we conclude that they are not protected under the FOIA. That request is denied. Because the Commission expressly requested this information, this is not a situation, as contemplated under section 0.459(e), where the information was "voluntarily submitted" to the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 9, 1989

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE PLANNING SUBCOMMITTEE MEETING

A meeting of the Planning Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

September 19, 1989
10:00 a.m.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The purpose of this meeting is to receive the reports of the Subcommittee's working parties and to review the work statement for the third period of Planning Subcommittee activities.

The agenda for the meeting is as follows:

1. Call to Order by the Chairman
2. Adoption of the Minutes of the Fifth Meeting
3. Introductory Remarks
4. Review of the Work Statement
5. Status Reports by the Working Party and Advisory Group Chairmen
6. Other Business
7. Date and Location of the Next Subcommittee Meeting
8. Adjournment

This meeting is open to the public.

Parties may submit written statements prior to or at the time of the meeting. Oral statements and discussion will be permitted under the direction of the Subcommittee Chairman.

Any questions regarding this meeting should be directed to Joseph A. Flaherty at (212) 975-2213 or William Hassinger at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 21, 1989

Commissioner Patricia Diaz Dennis releases separate statement for By DIRECTION LETTER in FCC 89-263, released August 16, 1989.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

Re: By Direction Letter Granting a Permanent Waiver of the One-To-A-Market Rule to Great American Television and Radio Co., Inc. (Great American) to permit its Continued Common Ownership of AM-FM-TV Combinations in Cincinnati, Ohio, and Kansas City, Missouri.

I would waive our one-to-a-market rule only in markets that have at least 10 television stations, 45 separate owners, and 65 broadcast stations. *See* Separate Statement of Commissioner Patricia Diaz Dennis in MM Docket No. 87-7 (released April 10, 1989). Neither Cincinnati nor Kansas City meets this test and, therefore, I would deny Great American's waiver requests.

These requests should also fail by the standard my colleagues announced just six months ago. *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989). At that time, the majority said it would "look favorably" on waiver applications only in the top 25 markets, and only if there were at least 30 voices in the market.[1] 4 FCC Rcd at 1751-52. In all other cases, the applicant still has the burden of demonstrating specific public interest benefits that outweigh the decrease in diversity.

Cincinnati and Kansas City both fall below the top 25 markets. Moreover, the impact on diversity could hardly be greater. In each market, Great American owns three stations with outstanding facilities: a VHF network affiliate, a Class B (Cincinnati) or Class C (Kansas City) FM station, and a powerful AM station with a favorable frequency at the lower end of the dial. These are the kinds of facilities best able technically to cover an entire market and best able financially to provide news and comment on public issues. Theses stations could also be readily sold to buyers with no other stations in the market. They are, in short, the kinds of stations to which the one-to-a-market rule should be most strictly applied.

The majority nevertheless waives the rule, based primarily on Great American's assertions of economic efficiencies. In light of this decision, the 25 market/30 voice standard may be simply a fig leaf to cover the goal of scuttling the one-to-a-market rule. If that is true, I would rather see the Commission repeal the rule than put the parties and the Commission's staff through the trouble, time, and expense of waiver proceeding. I remain committed to promoting diversity, but outright repeal of the rule would be more straightforward than letting it die a death by a thousand cuts.

FOOTNOTE

[1] The majority also said it would look favorably on waivers involving "failed" stations. 4 FCC Rcd at 1752-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 21, 1989

Commissioner Patricia Diaz Dennis releases separate statement in Order, FCC 89-274, released August 21, 1989.

CONCURRING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries.

I am sympathetic to the arguments the Joint Petitioners raise. Cable systems will have to order new equipment and deal with the administrative burden of syndicated exclusivity even though the Court of Appeals may yet overturn our decision to reimpose a syndicated exclusivity rule. I raised these concerns back in March, when I sought to extend the effective date of our new rule beyond December 31, 1989. *See* Separate Statement of Commissioner Patricia Diaz Dennis, *Memorandum Opinion and Order*, 4 FCC Rcd 2711, 2741-42 (1989).

Nevertheless, the legal test for granting a stay is strict. As explained in this *Order*, the Joint Petitioners have not met the burden imposed on them by *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Based solely on the Order's legal analysis, I join my colleagues in voting to deny the stay request.[1]

FOOTNOTE

[1] I do not adopt the Order's conclusions relating to the benefits of reimposing syndicated exclusivity. *See* Separate Statement of Patricia Diaz Dennis, *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5342 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Applications of

GE AMERICAN
COMMUNICATIONS, INC.

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service	File Nos. 2971-DSS-P/LA-88 2972-DSS-P/LA-88 2973-DSS-LA-88
For Authority to Modify the License of the Satcom K-1 Satellite	File No. 2965-DSS-ML-88

ORDER AND AUTHORIZATION

Adopted: July 28, 1989; Released: August 25, 1989

By the Commission:

I. INTRODUCTION

1. GE American Communications, Inc. (GE Americom) seeks authority to construct two, and to launch and operate three, 4/6 GHz domestic fixed-satellites.[1] The proposed satellites – Satcom C-1, C-3, and C-4 -- are intended to replace the Satcom 1R, 3R, and 4 satellites, respectively, at the end of their useful lives. GE Americom requests authority to offer up to all the capacity on its proposed satellites on a noncommon carrier basis. No comments were filed with respect to this application. For the reasons discussed below, we grant GE Americom's requests for three replacement satellites and transponder sales authority.

2. By separate application, GE Americom requests that we assign its proposed Satcom C-4 satellite to a location different from that at which Satcom 4 is operating.[2] In this application, GE Americom had also requested that we reassign its in-orbit 12/14 GHz Satcom K-1 satellite, which is assigned to 67^0 W.L. but is currently operating at 85^0 W.L., to the most westerly location available between 75^0 W.L. and 89^0 W.L. GE Americom subsequently requested that we authorize Satcom K-1 to remain at 85^0 W.L.[3]

3. Satellite Transponder Leasing Corporation (STLC) filed a petition to deny GE Americom's application with respect to the potential reassignment of Satcom K-1 to 89^0 W.L., and Electronic Data Systems Corporation (EDS) and Wal-Mart Stores, Inc. (Wal-Mart) filed comments in support of STLC's petition. Salomon Brothers Holding Company, Inc. (Salomon Bros.) also filed a petition for partial denial, objecting to the relocation of Satcom K-1 to 89^0 W.L. Finally, Hughes Communications Galaxy, Inc. (Hughes) filed comments on the requested reassignments of both Satcom K-1 and Satcom C-4. For the reasons discussed below, we defer action on GE Americom's reassignment requests.

4. GE Americom is a wholly-owned subsidiary of RCA Corporation which in turn is a wholly-owned subsidiary of General Electric Company. GE Americom provides a variety of telecommunications services, including video and audio services, commercial channels and data services, and service to the U.S. Government. It is currently operating four satellites at 4/6 GHz and two at 12/14 GHz. It is also authorized to construct, launch and operate one additional hybrid 4/6 GHz/12/14 GHz satellite.[4]

II. DISCUSSION

A. *Replacement Satellites*

5. Satcom 3R, Satcom 4 and Satcom 1R are expected to be removed from service in September 1992, April 1992 and June 1993, respectively. GE Americom seeks to replace these satellites, stating that grant of its applications would permit it to continue to meet the communications requirements of its customers and to provide new services to current and additional customers, without dislocation or service interruption.[5] The satellites to be constructed --Satcom C-3 and C-4 -- would each carry 24 transponders, each with a bandwidth of 36 MHz and an output power of 16 watts. The C-3 satellite would provide service to the 48 contiguous states, Alaska, and Hawaii, at a maximum effectively isotropically radiated power (EIRP) of 40 dBW. The C-4 satellite would provide service to the 48 contiguous states, with a spot beam covering Hawaii, at a maximum EIRP of 41 dBW. The C-1 satellite currently constructed as a ground spare is equipped with 24 transponders, each with a bandwidth of 36 MHz and an output power of 8.5 watts. It is operationally identical to the GE Americom 4/6 GHz satellites in-orbit. GE Americom requests the same locations that are currently assigned to its in-orbit satellites for these replacement satellites – specifically, 81^0 W.L., 130^0 W.L., and 138^0 W.L. – subject to the requested reassignment of Satcom C-4 discussed below. GE Americom estimates that the cost to construct, launch and operate these satellites for one year is $481.3 million. Finally, GE Americom proposes to offer all the capacity of Satcom C-1, C-3 and C-4 on a noncommon carrier basis.[6]

6. Pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, we find that authorizing GE Americom to construct, launch and operate the replacement facilities will serve the public interest, convenience and necessity. GE Americom is legally, technically, financially, and otherwise qualified to implement its proposed Satcom replacement satellites pursuant to Section 25.391 of the Commission's rules, 47 C.F.R. § 25.391. In addition, because GE Americom, in this application, is proposing to locate these facilities in the same locations as its currently operating satellites, no new orbital locations are required to accommodate its requests.[7] Our action here is consistent with our policy of routinely granting uncontested applications for replacement satellites at the same location as retired satellites. This is designed to permit continuity of service to both operators and their customers.[8] Finally, based on GE Americom's representations, we find that its proposed transponder transactions are noncommon carrier in nature and are otherwise consistent with our transponder sales policies.[9]

B. ***Orbital Reassignments***

7. GE Americom also requests orbital reassignments for two satellites. First, it initially requested that we reassign the Satcom C-4 replacement satellite to 97^0 W.L. or, in the alternative, to the most westerly available 4/6 GHz band orbital location between 85^0 W.L. and 101^0 W.L It later modified this request in its supplemental request for changes in the *1988 Assignment Order*, seeking assignment to 135^0 W.L. or 127^0 W.L. Second, GE Americom initially requested that we reassign Satcom K-1 to the most westerly available unassigned 12/14 GHz location between 75^0 W.L. and 89^0 W.L. in place of the 67^0 W.L. location to which it is currently assigned. It also modified this request in its supplemental request, seeking reassignment to 85^0 W.L., where Satcom K-1 is currently located.

8. The oppositions to GE Americom's requests for relocation focus, in this proceeding, on the potential reassignment of Satcom K-1 to 89^0 W.L. and the alleged interference into the operations of SBS-4, which is located at 91^0 W.L. In light of GE Americom's modified request for reassignment of Satcom K-1 to the 85^0 W.L. location where it is currently operating, these concerns have become moot.

9. We agree, however, with Hughes's suggestion that we consider GE Americom's reassignment requests in light of the *1988 Assignment Order*. We therefore defer action on GE Americom's requests, and will consider any reassignment of Satcom C-4 and K-1 in the context of acting on the pending requests for changes to the *1988 Orbital Assignment Order*.

10. In its initial requests for reassignment, GE Americom recognized that other applications for additional satellite authorizations and orbital assignments were pending before the Commission as part of the last domestic fixed-satellite processing group. It stated that it did not intend to prejudice the interests of any of these applicants and merely sought reassignment to locations that remained available after Commission action on these applications.[10] We acted on the then-pending requests in November 1988 and adopted a new orbital assignment plan at that time.[11] Several locations remained unassigned, and we afforded all operators an opportunity to request reassignment to any of these locations.[12] Five operators, including GE Americom for Satcom C-4 and K-1, filed requests for reassignment.[13] To avoid prejudicing the requests of other operators, and to enable us to consider all changes in orbital assignments together, we will consider GE Americom's applications for reassignment of Satcom C-4 and K-1 when we act on all requests for adjustments to the *1988 Orbital Assignment Order*.

III. CONCLUSION AND ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that Application File Nos. 2971-DSS-P/LA-88, 2972-DSS-P/LA-88 and 2973-DSS-LA-88 ARE GRANTED and GE American Communications, Inc. IS AUTHORIZED to construct two and to launch and operate three domestic fixed-communications satellites in accordance with the technical specifications set forth in its application.

12. IT IS FURTHER ORDERED that the Orbital Assignment Plan set forth in the Appendix to *Assignment of Space Stations in the Domestic Fixed - Satellite Service*, 3 FCC Rcd 6972 (1988), IS MODIFIED to assign the Satcom C-1 satellite to 139^0 W.L., the Satcom C-3 satellite to 131^0 W.L., and the Satcom C-4 satellite to 81^0 W.L.

13. IT IS FURTHER ORDERED that GE American Communications, Inc. SHALL COMPLY with Assignment of Space Stations in the Domestic Fixed-Satellite Service, FCC 88-373 (December 7, 1988), as well as the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations. These requirements include the filing of semi-annual reports on the progress of space station construction and current satellite operational status and transponder loading, as described in *1980 Orbit Assignment Order*, 84 FCC 2d 584, 611-612 (1981) and *1983 Domestic Fixed - Satellite Licensing Order*, 54 Rad. Reg. 2d (P&F) 577 (1983), at para. 91.

14. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, the authorization shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization by the following dates:

	Construction Commenced	Construction Completed	Launched
Satcom C-3	September 1989	August 1992	November 1992
Satcom C-4	May 1990	April 1993	July 1993
Satcom C-1	. . .	. . .	August 1993

15. IT IS FURTHER ORDERED that the license term for the space station is ten years and will begin to run on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

16. IT IS FURTHER ORDERED that GE American Communications, Inc. IS AUTHORIZED to sell 24 transponders on its Satcom C-1 satellite, 24 transponders on its Satcom C-3 satellite and 24 transponders on its Satcom C-4 satellite in accordance with Commission policies articulated in *Domestic - Fixed Transponder Sales*, 90 FCC 2d 1238 (1982), aff'd sub nom. *Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

17. IT IS FURTHER ORDERED that GE American Communications, Inc., as required by Section 25.202(c) of the Commission's rules, 47 C.F.R. § 25.202(c), will prepare any necessary submissions to the International Telecommunication Union (ITU) for coordination of these space stations in accordance with the ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of notification by the Commission.

18. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to GE American Communications, Inc. is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization, nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

19. IT IS FURTHER ORDERED that action on GE Americom's requests for reassignment of its Satcom K-1 and Satcom C-4 satellite, File No. 2965-DSS-ML-88, IS DEFERRED.

20. IT IS FURTHER ORDERED that the Petition to Deny filed by Satellite Transponder Leasing Corporation and the Petition for Partial Denial filed by Salomon Brothers Holding Company, Inc. ARE DISMISSED AS MOOT.

21. GE American Communications, Inc. is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] One of the proposed satellites is already constructed as an on-ground spare. *See* RCA American Communications, Inc., 84 FCC 2d 633 (1981).

[2] Satcom 4 is currently operating at 81^0 W.L. In its initial application, GE Americom requested that we assign Satcom C-4 to 97^0 W.L. or, in the alternative, to the most westerly available 4/6 GHz orbital location between 85^0 W.L. and 101^0 W.L. Subsequently, in the context of requesting changes to the assignments made in Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988) (*1988 Assignment Order*), GE Americom requested that we instead assign Satcom C-4 to 135^0 W.L. or 127^0 W.L. *See* Supplemental Request for Change of Orbital Assignments filed by GE Americom (April 13, 1989).

[3] GE Americom's Satcom K-3 satellite had been assigned to 85^0 W.L. and Satcom K-1 was to be moved to 67^0 W.L. when Satcom K-3 was launched. However, GE Americom recently relinquished its authorization for Satcom K-3, making 85^0 W.L. available for Satcom K-1. *See* GE Americom Supplemental Request for Change of Orbital Assignments, *id.*

[4] RCA Global Communications, 56 FCC 2d 660 (1975); RCA American Communications, Inc., 75 FCC 2d 531 (1979); 84 FCC 2d 633 (1981); GE American Communications, Inc., 3 FCC Rcd 6984 (1988).

[5] These applications were filed in September 1988, as part of the most recent processing group of domestic fixed-satellite applications. Applications to be included in this group were required to be filed by September 15, 1987. After the cut-off date, several licensees filed additional requests for replacement satellites, expressing confusion as to whether applications for replacement satellites, in addition to expansion satellites, were required to be filed by the cut-off date. Replacement satellites are those that operators substitute for existing satellites at the end of their lives at the same location so that customers can continue to be served without interruption or the need to repoint their antennas. *See* Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at paras. 26-27. We accepted the post-September 15 applications for filing and permitted other licensees to file applications for replacement satellites. *See* Public Notice, Report No. DS-765, 3 FCC Rcd 4795 (1988). In response, GE Americom filed applications for the three replacement satellites at issue here. We were not in a position to act on GE Americom's applications when we acted on the other domestic satellite applications in November 1988 because the pleading cycle on the GE Americom applications had not been completed. However, we stated that considering GE Americom's requests at a later date would not disadvantage GE Americom because, by definition, no additional orbital locations are needed to accommodate replacement satellites. Thus, GE Americom's applications could be granted in a subsequent order. *See 1988 Assignment Order*, *supra* note 2, at n. 32.

[6] *See also* letter from Counsel, GE Americom to Chief, Satellite Radio Branch (May 8, 1989) concerning transponder sales on Satcom C-1.

[7] In our *1988 Assignment Order*, *supra* note 2, we made slight adjustments to the assignments for Satcom 3R and 1R to reflect the recent trilateral arrangement among the United States, Canada and Mexico. This will be reflected in the assignments for the replacements for these satellites.

[8] *See 1988 Assignment Order*, *id.*, at n. 31.

[9] *See* Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd subnom.* Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., FCC 86-282 (June 10, 1986).

[10] Application at 2. Indeed, GE Americom modified its requests to comport with the *1988 Assignment Order*.

[11] *1988 Orbital Assignment Order*, *supra* note 2.

[12] *Id.* at para. 16.

[13] The others are National Exchange Satellite, Inc., GTE Spacenet Corporation, Hughes, and Alascom, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-79

In the Matter of
Furnishing of Customer Premises
Equipment by the Bell Operating
Telephone Companies and the
Independent Telephone Companies

ORDER

Adopted: July 28, 1989; Released: August 25, 1989

By the Commission: Commissioner Dennis concurring in the result.

I. INTRODUCTION

1. On February 1, 1988, the Independent Data Communications Manufacturers Association, Inc. ("IDCMA") filed an Application for Review of Action Taken Pursuant to Delegated Authority (the "February 1 Application") seeking reversal of the decision by the Common Carrier Bureau (the "Bureau") in the *BOC CPE Plans Order*,[1] to approve, subject to review in two years, the joint marketing plans of each of the Regional Bell Operating Companies ("BOCs"), except that of PacTel. On August 29, 1988, IDCMA filed an Application for Review ("August 29 Application"), seeking reversal of the Bureau's July 28 decision conditionally approving PacTel's amended joint marketing plan.[2] For the reasons set forth below, we deny both applications.

II. BACKGROUND

2. The *BOC CPE Order*[3] replaced structural separation requirements governing BOC provision of customer premises equipment ("CPE") with nonstructural safeguards. These nonstructural safeguards include a requirement that the BOCs provide independent CPE vendors with a meaningful opportunity to market CPE jointly with Centrex and other BOC network services (the "joint marketing requirement"). We expected this safeguard to further three principal goals: (1) providing independent CPE vendors with the opportunity to offer customers integrated CPE/network services packages on an efficient basis;[4] (2) fostering competition for the BOCs' CPE operations through alternative sources of "one-stop shopping"; and (3) increasing the availability of integrated service offerings to CPE customers that the BOCs do not choose to serve.[5] We also noted that the imposition of this safeguard on the BOCs would not be onerous since five BOCs had already implemented sales agency programs, and the other two had provided independent CPE vendors with joint marketing opportunities through "prime contractor" waivers.[6] We required each BOC to submit plans describing how it would comply with the joint marketing requirement, as well as other nonstructural safeguards, and we delegated authority to the Bureau to review these plans.

3. The BOCs filed their compliance plans on April 13, 1987. The five BOCs that already had sales agency programs in place -- Ameritech, BellSouth, NYNEX, Southwestern Bell, and US West -- proposed to comply with the joint marketing requirement by continuing these programs. Bell Atlantic, which did not have a sales agency program in place, proposed to implement a limited sales agency program on a trial basis and to couple this program with a Vendor Support program. PacTel, which also had no sales agency program, proposed a different approach consisting of Intermediary and Joint Marketing programs.

4. In its comments on the joint marketing plans, IDCMA urged the Bureau to reject these plans and to require each of the BOCs to implement a sales agency program that includes all network services. The limited scope of the existing plans, it argued, deprives certain categories of CPE vendors, such as the vendors of CPE for data applications, of meaningful joint marketing opportunities.

5. On December 30, 1987, the Bureau released the *BOC CPE Plans Order*, which conditionally approved all of the joint marketing plans except that of PacTel.[7] The Bureau declined to require the BOCs to pay commissions on all network services and to all qualified CPE vendors principally because: (1) such a requirement could be inefficient and might even affect local service rates; (2) an agency relationship available to a broader cross-section of vendors would increase the risk that poorly operated, but otherwise "qualified," vendors would diminish the BOCs' business goodwill; and (3) most of the BOCs' sales agency programs were still in a developmental stage and were expanding, both in terms of the number of sales agents and the services encompassed within the programs, even without regulatory intervention.[8] Nevertheless, the Bureau found that in light of certain limitations in existing sales agency programs (such as the numbers of vendors and network services included), these programs potentially could be improved as vehicles for providing joint marketing opportunities to independent CPE vendors. Thus, the Bureau stated that it would reassess these programs in two years.[9]

6. The *BOC CPE Plans Order* rejected PacTel's joint marketing plan. The Bureau instructed PacTel to revise its plan to incorporate a sales agency program or its functional equivalent. On February 12, 1988, PacTel submitted a revised plan adding a limited sales agency program to its Intermediary and Joint Marketing programs. PacTel stated that it would expand its sales agency program to additional services and markets after an initial period.

7. Mirroring its comments on the other BOCs' plans, IDCMA opposed PacTel's amended plan on the ground that its sales agency program was too limited in scope. However, in the *PacTel Joint Marketing Order*, the Bureau conditionally approved PacTel's plan. The Bureau said it would reassess PacTel's joint marketing program when the Bureau reviewed the other BOCs' programs.

III. IDCMA'S APPLICATIONS FOR REVIEW

8. IDCMA asks us to reverse the Bureau's conditional approval of the BOCs' joint marketing programs and require that these programs be expanded to include all, or at least a significantly increased number of, network services, including data transmission services.[10] IDCMA claims that by excluding vendors of data CPE from their sales agency programs, the BOCs have failed to fulfill one of the principal purposes of the joint marketing requirement -- the promotion of parity and fair competition in the CPE marketplace.

9. IDCMA further argues that existing sales agency programs are inadequate in the present circumstances. It claims that we permitted the BOCs to engage in only limited joint marketing with their CPE subsidiaries when *Computer II* structural separation was in effect and that BOC sales agency programs reflected this limited authority. Now that the structural separation requirement has been lifted, it claims, the BOCs are free to market any service in any geographic area jointly with CPE. IDCMA says BOC sales agency programs should be correspondingly broader.

10. IDCMA challenges each of the Bureau's reasons for refusing to expand BOC sales agency programs to all or substantially all network services. For example, it claims that to the extent that payment of sales commissions for so-called "demand services"[11] could affect the cost of providing such services, and, consequently, the rates charged for them, the remedy would appear to be lower commissions, rather than abandonment of the sales agency requirement for these services. It also states that the Bureau failed to substantiate the Bureau's assertion that sales agency programs were growing in scope, without regulatory intervention. Finally, IDCMA argues that the BOCs' interest in sales agent quality control does not justify exclusion of whole categories of vendors.

IV. POSITIONS OF THE PARTIES

11. All BOCs except US West filed comments opposing the February 1 Application.[12] In addition, the North American Telecommunications Association ("NATA") filed comments recommending that we urge the BOCs to continue the timely expansion and improvement of their sales agency programs.[13]

12. The BOCs generally argue that the Bureau correctly found that BOCs have been expanding their sales agency programs on their own and that regulatory intervention is thus unwarranted and unnecessary. NYNEX, for example, states that it now provides sales agents with the opportunity to earn commissions on "a myriad of NYNEX Telephone Company services" and it attaches a list of such services.[14] Southwestern Bell states that its sales agency program includes digital 1.544 mbps, premium and standard Digital Data Services (DDS), intrastate Wide Area Telephone Service (WATS) and 800 service, and custom network services.[15] Bell Atlantic, PacTel, and BellSouth all state that they are currently examining what other services, including data services, to add to their sales agency programs.[16] The BOCs argue that they should be permitted to expand their sales agency programs in an orderly manner and without regulatory interference and that they should be able to determine the services for which commissions will be paid based on their marketing needs. Indeed, BellSouth argues that it is aware of no firm in any industry that is required to pay commissions on everything it sells and without regard to such factors as market conditions.[17] BellSouth and other BOCs argue that a requirement that they pay commissions without regard to these factors -- for example, on demand services -- would necessarily impact on local service rates.[18]

13. Many BOCs also dispute IDCMA's assertion that joint marketing opportunities are foreclosed to CPE vendors that are not sales agents. BOCs state that many CPE vendors already order data services on behalf of their customers and that such vendors receive substantial assistance from the BOCs in this process, either through centralized operations groups (COGs) or other BOC support structures.[19]

14. Finally, Ameritech argues that the joint marketing requirement is unnecessary in the first place, so that efforts to expand it should be rejected. Ameritech argues that other nonstructural safeguards adequately ensure against cross-subsidization and discrimination and that the joint marketing requirement serves neither of these ends.

15. The IDCMA reply states that we need not take corrective action against BOCs that offer sales agency arrangements for a large and increasing number of network services with reasonable geographic limitations. IDCMA does not expressly identify BOCs that would satisfy that test, but it appears to find at least some measure of fault with all of the programs except those of the US West companies and New York Telephone.[20]

16. IDCMA also challenges arguments by the BOCs that BOCs should not be required to pay commissions on "demand services." IDCMA states that it has no desire to burden local ratepayers, but argues that fairness requires that if the BOCs allocate some portion of the joint marketing costs for a particular service to the regulated side of their operations, the BOCs should pay a commission to an independent CPE vendor that sells that service and thereby saves the BOC that marketing cost.[21] IDCMA states that there is no reason why commission levels could not be structured to correlate with marketing costs allocated by the BOCs.[22] It also argues that to the extent sales agency arrangements stimulate network usage, the payment of commissions would not require a rate increase.[23]

17. IDCMA rejects arguments by the BOCs that the BOCs should be able to select the services on which they will pay commissions based on marketing considerations. IDCMA states that there is no justification for requiring that the joint marketing safeguard be implemented in a way that furthers the BOCs' business interests.[24]

V. DISCUSSION

18. We deny IDCMA's applications for review and affirm both the *BOC CPE Plans Order* and the *PacTel Joint Marketing Order*. In establishing the joint marketing safeguard, we did not intend to require immediate expansion of BOC sales agency programs to all network services. Rather, we established this safeguard, in part, to address concerns that had been expressed by the CPE industry shortly before the *BOC CPE Order* was adopted that the BOCs would terminate or significantly reduce their sales agency programs once structural relief was implemented.[25] Moreover, as the Bureau noted, we explicitly cited the five existing sales agency programs in rejecting claims that the imposition of this safeguard would be onerous and difficult to administer for the BOCs. Thus, we find

that the Bureau correctly determined that BOCs may satisfy the joint marketing requirement by maintaining and continuing to develop their existing sales agency programs, or, in the case of Bell Atlantic and PacTel, by initiating a sales agency program in conjunction with other vendor support activities.

19. Although, we share the concerns of the Bureau and IDCMA about the long-term limitations of some of the BOCs' sales agency programs as instruments for providing joint marketing opportunities to a broad cross-section of CPE vendors, we believe that regulatory intervention at this time is not warranted. We agree with the Bureau that this is a sensitive area, as it involves, in many cases, the payment of commissions for local exchange services and the establishment of agency relationships between two business entities. Moreover, the record in this proceeding indicates that most of the BOCs have already expanded their sales agency programs to include new service offerings and that all are considering additional offerings, including the data services that are of most concern to IDCMA.[26] In addition, discussions are underway between independent CPE vendors and the BOCs concerning the expansion of the sales agency programs in a manner responsive to the needs of the carriers, the independent CPE vendors and the users of integrated CPE/network service offerings.[27] We believe that this industry dialogue should be encouraged. It furthers the public interest to provide industry participants with a reasonable period of time in which to reach an agreement on the manner in which the sales agency programs should be further developed. Nevertheless, we do wish to emphasize that one of the purposes of the joint marketing safeguard is to promote competition in the CPE/network services marketplace by providing independent CPE vendors, as well as the BOCs, with meaningful joint marketing opportunities. The Bureau has pledged to reassess the adequacy of the joint marketing programs in the near future and to make recommendations to us regarding "any modifications or supplements to the sales agency programs that might be necessary."[28] If the Bureau finds that these programs are not fulfilling the purposes of the joint marketing condition at that time, we can take whatever corrective action is necessary.

VI. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED, That pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403, and 404 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 218, 220, 403, and 404, and Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, IDCMA's Applications for Review, dated February 1, 1988, and August 29, 1988, respectively, are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Order*, 3 FCC Rcd 412 (1987).

[2] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Order*, 3 FCC Rcd 4604 (1988) (*"PacTel Joint Marketing Order"*).

[3] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Report and Order*, 2 FCC Rcd 143 (1987), *modified on reconsideration*, 3 FCC Rcd 22 (1988).

[4] The joint marketing condition makes it economically feasible for an independent CPE supplier to market CPE and network services jointly. When a BOC markets an integrated package of CPE and basic services, the costs associated with marketing the network service component of that package are included in its rate base for basic services. Those costs are not borne by the BOC's CPE operations. An independent CPE vendor, on the other hand, must absorb the entire cost of designing and marketing an integrated CPE/network service offering, including the costs associated with the network service component of that offering. Without a joint marketing program, therefore, these vendors would not be able to compete on comparable terms with the BOCs' CPE operations. The commissions paid to these vendors pursuant to joint marketing programs place them on a more equal and competitive footing with the BOCs in the provision of integrated services.

[5] In the *BOC CPE Order*, we also noted that the commissions paid to independent CPE vendors could provide a useful benchmark for evaluating the reasonableness of the allocations of the marketing costs that the BOCs incur in the provision of integrated CPE/network services offerings. *BOC CPE Order*, 2 FCC Rcd at 148. Although, we have adopted rules that specifically govern the BOCs' allocation of costs between CPE and basic services, *Separation of Costs of Regulated Telephone Services for Costs of Nonregulated Activities*, 2 FCC Rcd 1298 (1987), *recon.*, 3 FCC Rcd 6283 (1987), *further recon.*, 53 Fed. Reg. 49320 (Dec. 7, 1988), *petitions for review pending sub nom., Southwestern Bell Corp. v. FCC*, D.C. Cir. No. 87-1764 (filed Dec. 14, 1987), and *National Telephone Cooperative Association v. FCC*, D.C. Cir. No. 87-1771 (filed Dec. 15, 1987), we continue to believe that the commissions paid to independent CPE vendors may provide a benchmark by which to assess the reasonableness of the BOCs' allocations of joint marketing costs pursuant to these rules. The prevention of cross-subsidization, however, is not the primary reason that we adopted the joint marketing condition. As we indicated in the *BOC CPE Reconsideration Order*, 3 FCC Rcd at 27, that condition is fully justified on the basis of the purposes set forth in paragraph 2 above.

[6] 2 FCC Rcd at 156, para. 93. *See* Emergency Petition for Limited Waiver of Section 64.702 of the Commission's Rules and Regulations to Permit Provision of Centrex Service and Associated Customer Premises Equipment on a Prime Contractor Basis, *Memorandum Opinion and Order*, AAD-50002B, Mimeo No. 0358 (released Octover 18, 1985); Petition for Limited Waiver of Section 64.702 of the Commission's Rules and Regulations to Permit Pacific Bell and Nevada Bell to Provide Centrex Service on a Prime Contractor Basis, *Memorandum Opinion and Order*, AAD 5-1241, Mimeo No. 1859 (released January 9, 1986).

[7] *BOC CPE Plans Order*, 3 FCC Rcd at 421-22, paras. 69-73.

[8] The Bureau also stated that IDCMA's comments appeared to be "more in the nature of a reconsideration petition than a proposal for action to be taken in a compliance proceeding at

the Bureau level, since the Commission has already indicated that existing sales agency programs would satisfy athe joint marketing requirement established in the *BOC CPE Order*." 3 FCC Rcd at 421, para. 70.

[9] Noting some of the problems with existing sales agency programs, the Bureau commented that Bell Atlantic's plan to combine a sales agency program with more widely available vendor support activities might prove to be a better way of meeting the joint marketing requirement.

[10] IDCMA Application for Review at 4. *See also* IDCMA Reply at 6, 9. IDCMA's August 29 Application for Review incorporates by reference the arguments in its February 1 Application, and, except as otherwise noted, contains no new arguments. *See* August 29 Application at 2-3. Citations to the record herein relate to IDCMA's February 1 Application unless otherwise indicated.

[11] IDCMA uses the term "demand services" to describe services with relatively fixed demand that is not affected by marketing efforts.

[12] PacTel also filed an opposition to IDCMA's August 29 Application which incorporates by reference PacTel's comments on the February 1 Application. *See* PacTel Comments on August 29 Application at 2. Pactel disputes IDCMA's contention that PacTel's joint marketing program makes PacTel the sole source of integrated marketing solutions for services outside the scope of the sales agency program. *Id.* at 3-5.

[13] NATA states that although the efforts to implement sales agency to the full extent of our mandate have not been without difficulty and differences of opinion, the majority of BOCs seem to have been generally cooperative and to have made a good faith effort. NATA asks us to give impetus to these efforts by clarifying that each BOC should have fully expanded its program by the time the Bureau commences its two-year review of the joint marketing programs. NATA Comments at 3-4.

[14] NYNEX Comments at 4.

[15] Southwestern Bell Comments at 3.

[16] Bell Atlantic Comments at 5; PacTel Comments at 6; and BellSouth Comments at 4. Bell Atlantic states that thus far it has added 800 and Remote Call Forwarding services to its program, while BellSouth states that it has added Combined OUTWATs access sales to its sales agency program. Bell Atlantic Comments at 5; BellSouth Comments at 4.

[17] BellSouth Comments at 3.

[18] *Id.* at 6; Ameritech Comments at 7; Southwestern Bell Comments at 5.

[19] *See* Bell Atlantic Comments at 3-4; BellSouth Comments at 5-6; Southwestern Bell Comments at 3-4; and Ameritech Comments at 9. Indeed, Ameritech argues that since its share of the CPE market is only 3.6%, it would make little sense for it to refuse assistance to the interconnect industry, since such refusal could result in numerous missed network sales opportunities. Ameritech Comments at 9.

[20] IDCMA Reply at 4, n. 7.

[21] IDCMA states that if marketing demand services is of no value, as some BOCs claim, the BOCs should not be permitted themselves to allocate to their network operations any portion of the costs of joint marketing such services. *Id.* at 5, n.9. Alternatively, it claims, the BOCs should not be permitted to joint market any service for which it pays no commission. *Id.* at 8.

[22] *Id.* at 4, n. 7.

[23] *Id.* at 5. The IDCMA August 29 Application asserts that it is unlikely that broader sales agency programs would have an impact on local rates, since the BOCs will pay sales commissions only to unaffiliated agents and will thus have an incentive to keep commissions as low as possible. August 29 Application at 5-6.

[24] *Id.* 9.

[25] *See* letter from Edwin B. Spievack, NATA, to Chairman Mark S. Fowler (November 10, 1986) (*ex parte* filing in CC Docket No. 86-79).

[26] *See, e.g.,* PacTel Comments at 6; Bell Atlantic Comments at 5.

[27] *See, e.g.,* NATA Comments at 2-3.

[28] *BOC CPE Plans Order,* 3 FCC Rcd at 421.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-603

In the Matter of

Amendment of Section 73.202(b), RM-6455
Table of Allotments,
FM Broadcast Stations.
(Hot Springs Village, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1989; Released: August 25, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 782 (1989), issued in response to a petition filed on behalf of Caddo Broadcasting Co. (petitioner), proposing the allotment of FM Channel 225A to Hot Springs Village, Arkansas, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 225A to Hot Springs Village, since it could provide a first local broadcast service to the community.

3. As indicated in the *Notice*, Channel 225A can be allotted to Hot Springs Village in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 10, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Hot Springs Village, Arkansas	225A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 225A at Hot Springs Village, Arkansas, will open on **October 11, 1989,** and close on **November 9, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for Channel 225A are 34-40-19 and 92-59-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 25, 1989

COMMISSION INCLUDES LETTERS IN CC DOCKET NO. 80-286

In CC Docket No. 80-286, *Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board,* the Commission requested information from two manufacturers of digital switches. The Commission sought information concerning the engagement of local switches by local and toll call attempts.

American Telephone and Telegraph Company and Northern Telecom Inc. responded by letter on July 12, 1989, and July 27, 1989, respectively. These letters, as well as an explanatory letter from Charles W. Needy, Accounting & Audits Division, Common Carrier Bureau, on June 13, 1989, have been made a part of the official CC Docket No. 80-286 file.

Persons wishing to review or copy these letters may do so during normal business hours in the Commission's Docket Reference Room, 1919 M Street, N.W., Room 239, Washington, D.C. 20554. Copies may also be obtained from the Commission's copy contractor, International Transcription Service, 2100 M Street, N.W., Room 140 Washington, D.C. 20037 (202) 857-3800.

For further information please contact Charles Needy at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-279

In re Applications of

POUGHKEEPSIE BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870331OR
WICRAE EQUITIES LIMITED	File No. BPH-870414KH
POUGHKEEPSIE COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KT
THE KINNEY GROUP	File No. BPH-870415ME

For a Construction Permit for a
New FM Station on Channel 241A
in Poughkeepsie, New York

Appearances

Lee J. Peltzman on behalf of Poughkeepsie Broadcasting Limited; *Kevin Reed* and *Thomas J. Hutton* on behalf of Wicrae Equities Limited; *Lewis I. Cohen* and *John J. Schauble* on behalf of Poughkeepsie Communications Limited Partnership; *Jerome S. Boros* and *Jerome S. Silber* on behalf of the Kinney Group; and *Robert A. Zauner* on behalf of the Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: August 18, 1989; Released: August 25, 1989

1. The four applications listed in the caption and seven other applications now dismissed were designated for a comparative hearing on the following issues which remain to be resolved in this decision (*Hearing Designation Order*, 3 F.C.C. Rcd 3712 (released June 14, 1988)):

1. If a final environmental impact statement is issued with respect to . . ., PBL, . . ., Wicrae . . or Group, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal(s) are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§1.1301 - 1.1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applicants should be granted, if any.

2. A prehearing conference was held on August 15, 1988. *Order*, FCC 88M-2644, released August 17, 1988; Tr. 1-18. Written testimony was exchanged on February 8, 1989 and hearing sessions to cross-examine written testimony were held on February 27, 28, March 1, 2, 3, 1989. The hearing record was closed on March 3, 1989. Tr. 1258; Order, FCC 89M-726, released March 7, 1989. Proposed findings of fact and conclusions were filed on April 28, 1989 and replies were filed May 18, 1989.

FINDING OF FACT

Issue 1: The Environmental Impact of the Proposals

3. PBL, Wicrae and Group were required to submit, within 30 days of the release of the HDO (June 14, 1988), the environmental assessment required by 47 C.F.R. §1.1311 to the presiding officer and the Chief, Audio Services Division. Wicrae filed the amendment on July 13, 1988, within the time permitted. The Chief of Audio Services found that there will be no adverse environmental impact if the measures to protect humans from nonionizing radiation are carried out as proposed. Letter from Jan W. Gay, Assistant Audio Services Division to Edward J. Kuhlmann (July 18, 1988). The Bureau has required that a grant to Wicrae be conditioned on erecting a fence to protect the public from RF radiation. *Id.* Wicrae requested summary decision on issue 1 at the start of the hearing and it was granted. Tr. 32.

4. On July 28, 1989 Group filed an amendment to meet issue 1. The Assistant Chief of the Audio Services Division made the same finding with regard to Group's showing as he did about Wicrae's. Letter from W. Jan Gay, Assistant Chief, Audio Services Division to Edward J. Kuhlmann (August 1, 1988). Group requested summary decision, which was granted. *Memorandum Opinion and Order*, FCC 89M-83, released January 12, 1989. If a grant is made to Group, it will be conditioned upon Group erecting a fence to protect the public from RF radiation.

5. PBL did not file an amendment as required by ¶ 3 of the HDO. On July 14, 1988, PBL filed an engineering statement which apparently was intended to meet issue 1. The statement, however, was not sent to the Chief, Audio Services Division as required by the HDO. On July 5, 1989, PBL filed the amendment required by the Bureau and W. Jan Gay, Assistant Chief Audio Services Division, on July 10, 1989, stated that there would be no adverse environmental impact if measures to protect humans from nonionizing radiation are carried out.

Issue 2: On a Comparative Basis The Proposals That Would Best Serve The Public Interest

Full-Time Participation in Station Operation by Owners

PBL

Organization

6. PBL is a limited partnership with three limited partners, Matthew J. Cooney, Jr., Noel and Peter deCordova and one general partner, Steven Freeman. PBL Exh. 1.

Mr. Cooney owns 40% of the equity in the partnership and the other partners, the deCordovas and Freeman each own 20%. *Id.* PBL represents that Mr. Freeman holds the only voting interest. *Id.* Matthew Cooney, at the time this application was filed, owned four broadcast stations, WCHN and WKXZ-FM, Norwich, New York and WQNY-FM and WTKO, Ithaca, New York. Tr. 503-4. In May 1985 he learned that a new FM channel had been assigned to Poughkeepsie. Tr. 506-07. In December of 1985, he asked Peter deCordova, an automobile dealer who advertised on his stations, whether he would be interested in investing in the Poughkeepsie station if he applied. Tr. 507-08. They called Peter deCordova's brother, Noel deCordova. Noel deCordova is a lawyer with the firm of Van deWater and Van deWater in Poughkeepsie. Tr. 410, 421.

7. Mr. Cooney told the deCordovas that the Commission's comparative policy favored minorities, women, local residents and experienced broadcasters. Tr. 419, 509. Mr. Cooney explained to them that while the Poughkeepsie FM channel was an investment opportunity, the "key would be finding someone to make it happen." Tr. 509. Mr. Cooney explained that he had to remain in Norwich because he and his spouse were "tied down to that area." *Id.*

8. Peter deCordova and Matthew Cooney asked Noel deCordova "to find a qualified person to take it forward." Tr. 509. Mr. Cooney told Noel deCordova that he should look for someone who fit the comparative criteria. *Id.* Noel DeCordova asked the law firm's librarian, Brenda Cherry, to find a general partner for the group. Tr. 421. She suggested Steven Freeman. Tr. 422. Noel deCordova interviewed Mr. Freeman at his law office, in January 1986, and within a month they met in Poughkeepsie with the other two PBL partners. Tr. 56-9, 423-6. The deCordovas and Cooney decided after meeting Freeman that he would make a suitable partner. Tr. 427. In March 1986, they decided to file an application for the facility. Tr. 63.

9. The limited partners have assisted Freeman in preparing the proposal and offered him advice. Mr. Cooney, in the summer of 1986, spoke with Washington, D.C. communications counsel, Jay Baraff, about the cost of prosecuting the application. Tr. 554-5. He did this because the deCordovas had asked what the cost would be for legal services. Tr. 555. Mr. Cooney was also concerned. *Id.* Mr. Cooney had found Baraff's firm expensive when he had done business with them in the past. *Id.* Mr. Baraff assured him they would do their best for the partnership. Tr. 555-6. Mr. Freeman was unaware that Mr. Cooney had talked with Baraff. Tr. 177. He maintained that he had hired Baraff after talking with him. Tr. 74-7. Mr. Freeman stated originally in interrogatories and in his testimony that he spoke to Baraff about hiring him in late October 1986. Tr. 176-7. But when he was shown that a check for $2,000 was sent from the Van deWater and Van deWater client custodial account to Baraff's firm in August 1986 (PCLP Exh. 4.), he agreed that the check was written before he contacted the firm. Tr. 179. He then represented that he had decided to hire the Baraff firm but he did not speak to them until later. Tr. 180. He said the check was sent because there was "some talk" about hiring the firm but no decision had been made. Tr. 180-1. That talk was with Noel deCordova, who, Freeman represented, knew about Mr. Cooney's relationship with the firm. Tr. 186. Mr. Freemen conceded that Noel deCordova sent the check to the Baraff firm. Tr. 187-8. Mr. Freeman then said, during his testimony on the following day, that he spoke with Baraff's firm in early August or July 1986. Tr. 395. He changed his testimony, he said, because he claimed that he would not have paid Baraff or had PBL offer any payments to the firm without retaining him. Tr. 396. He said he did not have any knowledge about when the firm was hired when he represented in interrogatories that he spoke with Baraff in late October 1986 about hiring the firm. Tr. 395. He realized that his testimony was in error the previous evening. Tr. 396, 401-2. It is Freeman's position that his claim that he talked with Baraff about hiring him in late October was approximately right, the import being that July or August is approximately October. Tr. 403-4.

10. Freeman also claims he told the Baraff firm to send correspondence involving PBL to him and not to the limited partners. Tr. 139-40. He was aware that one overdue bill was sent to the limited partners but he was unaware that all bills were sent to at least some of the limited partners. Tr. 192-3; PCLP Exh. 5. While Freeman received the bills, they were sent to Peter deCordova and Matthew Cooney, originally, and, later, to Noel deCordova. PCLP Exh. 5, at 1-8 and 10-23. Noel deCordova believes he requested that the Baraff firm send him statements because he liked to review legal bills. Tr. 463.

11. When Freeman was trying to locate a transmitter site, it was Noel deCordova who told him he should talk to a client of deCordova's who owned a broadcast tower. Tr. 461. Mr. deCordova's law firm also prepared PBL's tax returns. Tr. 450-1. While the firm did not bill PBL, Noel deCordova expects that it will. *Id.* In addition, although the limited partners urged Freeman to settle the case, Noel deCordova told him at one point that a settlement would be premature. Tr. 135-6. PBL represented in answers to interrogatories that Noel deCordova alone obtained a bank letter from Dutchess Bank and Trust Company. Tr. 217-18. However, Freeman claimed that he, along with deCordova, obtained the letter. Tr. 106-7. Freeman represented that he suggested the bank to deCordova. Tr. 112. But deCordova said he contacted the Dutchess Bank and Trust Company's Paul Mack, who is his personal banker. Tr. 456. Mr. Freeman's only previous involvement with the Dutchess Bank and Trust Company had been to obtain student loans from funds which his college borrowed from the bank. Tr. 107-8. He claimed that he had attended high school with the manager but he could not remember the person's name. Tr. 122, 216, 397-8. In any event, the bank sent the letter to deCordova (Tr. 457) and, ultimately, Freeman agreed, the interrogatory answer crediting deCordova with the loan was accurate.

12. PBL's counsel recommended to Freeman that PBL hire as its consulting engineer Smith & Powstenko. Tr. 79. Then, Freeman hired the firm. In answers to interrogatories PBL stated that Freeman had asked Cooney about the engineering firm of Smith & Powstenko and that Cooney had told him the firm had a good reputation. Tr. 212. Mr. Cooney testified that he remembered discussing the firm with Freeman when it was being considered by him. Tr. 565-6. Mr. Freeman, however, denied asking Mr. Cooney for his opinion. Tr. 208. He claimed, moreover, that he had considered hiring another

engineering firm, although he could not recall its name. Tr. 204-5. PBL's interrogatories indicate that none of its principals considered another engineering firm. Tr. 205.

13. PBL maintains that Freeman was solely responsible for handling PBL's public notices. Tr. 348. However, Mr. Freeman was aware of only one notice that had been filed with regard to PBL's application. Tr. 343-4. Todd Stall, who served as counsel to the partnership, actually made the arrangements for the notice of filing. Tr. 348-9; PCLP Exh. 7. PBL also claimed that Freeman established the public file. Tr. 348. But, in fact, communications counsel sent the file to Mr. Stall and he compiled it with Mr. Freeman, who claims he then took it to the public library. Mr. Freeman represented that he prepared the application but he has no recollection of the numerous pages of instructions. Tr. 156-8.

14. Mr. Freeman stated that he asked the limited partners for his 20% interest (Tr. 324-5) but he conceded when questioned further that his 20% interest was the share remaining after the limited partners took 80%. Tr. 325-6. The limited partners decided that Freeman would have a 20% interest. Tr. 432-3. Mr. Freeman is not personally liable for PBL's debts beyond his initial capital contribution. Tr. 88-90. The limited partners agreed, at his request, to change the partnership agreement to change his liability. Tr. 89. If the application is denied, Freeman is not obligated to repay loans made by the partners. PCLP Exh. 6, at 8.

15. PBL's limited partnership agreement requires each partner to make a capital contribution in exchange for his equity. PCLP Exh. 6 at 5. Mr. Freeman made his contribution the week before the hearing, while the limited partners made theirs before 1988. Tr. 329-30, 393. The partnership agreement obligates the limited partners to provide all funds needed for prosecution of the application and construction and operation of the station. PCLP Exh. 6, at 6. Noel deCordova believes that the limited partners are not required to do so. Tr. 474-5. He has provided $13,000; Mr. Cooney has contributed $17,000 or $18,000. Tr. 453, 562. Mr. Freeman contributed $2,000 and another $300, for which he has been reimbursed. Tr. 97, 368-9. The partners' loan, Mr. Freeman said, need be repaid only if there is a profit or the station is sold. Tr. 318, 321. The partnership agreement provides that they must be repaid if Mr. Freeman's salary exceeds $25,000. PCLP Exh. 6, at 7.

16. The limited partners have a right of first refusal if Mr. Freeman sells his interest but the limited partners can devise their interests to family members without offering their interest to the other partners. PCLP Exh. 6, at 20-1; Tr. 335-6.

17. Noel deCordova drafted notes which represent 20% of the limited partner's advances and he told Mr. Freeman to sign them. Tr. 376. Mr. Freeman originally believed the notes were executed in favor of the partnership (Tr. 366) but he did not know their amounts. Tr. 366-7. Mr. Freeman did not know the purpose of the notes. Tr. 373-6. A draft of the partnership agreement had required them, but no provision for notes was included in the final agreement. Tr. 361-2. Todd Stall, the partnership's local counsel, told Freeman not to sign any more. Tr. 376.

Integration

18. Mr. Freeman proposes to work 40 hours per week, full time, as the general manager. PBL Exh. 2, at 1. He will be responsible for overseeing the activities of all station departments, determine station policies and supervise day-to-day operations. *Id.* He has lived in Poughkeepsie since he was born in 1953, except for parts of 1970-74 when he went away to school and 1979 to 1982 when he lived in Chicago. PBL Exh. 3, at 1-2. Mr. Freeman belongs to a local church where he has been active in the youth program; from 1965-1971, he was a volunteer at the YMCA Leadership Training Program; he has worked for the local recreation department during two summers; and during 1986 he worked with the Poughkeepsie Block Association, the Black Businessmen's Association, and participated in other activities. PBL Exh. 3, at 4-5.

19. During 1976-77, Freeman served as a volunteer music director at his college radio station. When he was at Dutchess Community College, he was an on-air personality at the college's radio station, for which he received college credit. PBL Exh. 3, at 3; Tr. 315, 316. From 1980 to 1982, he was an intern and assistant music director at WGCI-FM, Chicago. PBL Exh. 3, at 3. From mid-1983 to 1985, he was an account executive at WWWI in Hyde Park, New York. *Id.* He also volunteered at WVKR-FM. During the summer of 1984, he was the assistant station manager at WVKR-FM, New York. *Id.* Mr. Freeman worked at WDST-FM, Woodstock, New York from late 1985 to early 1986. Tr. 303. From the fall of 1986 to spring 1987, he worked at WLIB(AM), New York, New York. Tr. 306. He claims he worked full time as an account executive. Tr. 302, 305. PBL Exh. 3, at 3; Tr. 301-2. But, Freeman also claims that he worked full time at Vassar College's Audio Visual Research Center since 1985. PBL Exh. 3, at 3; Tr. 301-2. When he became aware from the the questioning that his testimony was inconsistent, he said he worked at the center only since September 1987. Tr. 303-10.

Wicrae

Organization

20. Wicrae is a corporation with ten stockholders, each stockholder has subscribed to a 10% interest. Wicrae Exh. 1. Five of the subscribers propose to work at the station: Martina L. King, Margaret Engler, H. John Idema, Gayle M. Corbin, and Stanislaus Wiktor. Wicrae Exh. 7, at 1.

Integration

21. Martha King proposes to work full time, at least 40 hours per week, as general manager of the proposed station. Wicrae Exh. 2, at 1; Wicrae Exh. 7, at 1. Her duties will include the supervision of station operations and management of the station's sales, personnel, news and entertainment programming, business, promotion and community affairs. Wicrae Exh. 2, at 1; Wicrae Exh. 7, at 1. For 19 years Ms. King has lived in Beacon, New York, which is within the proposed 1 mV/m contour, and for 21 years she lived in Poughkeepsie. Wicrae Exh. 2, at 1. She has participated in community activities within the service area. Her community involvement has included working for a telephone hot line for battered women and the Dutchess County Dispute Resolution Center; Ms. King is also affiliated with Barrett House and the Mid-Hudson Arts & Science Center and participates in her

church. Wicrae Exh. 2, at 1-2. Her activities for the hotline ended last summer. She began her interest in the dispute resolution center in 1984 or 1985. She takes classes at Barrett House and attends openings at Barrett House and the Mid-Hudson Arts & Science Center. Tr. 609, 610-11, 613-14.

22. Ms. King has no broadcast experience. She is a black African-American and female. Wicrae Exh. 2, at 1. After she retired from IBM, in February 1989, she became a real estate agent with Weichert Realtors in Fishdale, New York. Tr. 604-5. She works 12 hours a day, seven days a week. Tr. 605. Ms. King did not reveal this job in her written testimony and she has not promised to quit if the application is granted. Tr. 617. Ms. King did indicate that she viewed this job as something to do until the application is granted. Tr. 616.

23. H. John Idema proposes to work full time, at least 40 hours per week, as sales and real property manager. Wicrae Exh. 4; Wicrae Exh. 7, at 3; Tr. 621. Mr. Idema explained that he would "probably" be in charge of real estate acquisition, arranging for the location of studios and offices, and that when the station "has begun to move along" he would arrange for the solicitation of advertisers. Tr. 698. He will handle the property activities himself but Ms. King would actually decide which studio site should be acquired. Tr. 702-3. Mr. Idema is unfamiliar with advertising time sales, he said, and he will not have the authority to hire or fire. Tr. 703-5.

24. Mr. Idema has lived in Poughkeepsie or the area since 1931. Wicrae Exh. 4. He was president of the Poughkeepsie Lions Club in 1963 and 1964. Wicrae Exh. 4; Tr. 696. From 1962 to 1972, he belonged to the Poughkeepsie Chamber of Commerce. Wicrae Exh. 4. He was founding chair of the Dutchess County Lions Sight Restoration Committee. *Id.* From 1969 to 1974 he was active with the Boy Scouts and he belongs to a church. *Id.*; Tr. 627, 708.

25. Gayle M. Corbin proposes to work full time, 40 hours per week, as director of community affairs and promotions. Wicrae Exh. 5, at 1. She will be in charge of station promotions and relations with the community. *Id.* Ms. Corbin explained during her testimony that about one-half to three-quarters of her time will be spent as office manager overseeing payroll, taxes, bookkeeping and maintaining general business records. Tr. 727-9. Although she has not discussed it with other members of the applicant, she believes she will cover community events for the station. Tr. 726-7.

26. Ms. Corbin has lived in the service area since 1947. Wicrae Exh. 5, at 1. During 1986 and 1987, she participated in the Dutchess County Court Monitor. Wicrae Exh. 5, at 1. She belongs to a church and fifteen years ago she belonged to the New Hackensack Fire Company Auxiliary. Wicrae Exh. 5, at 1-2; Tr. 730. Ms. Corbin is female. Wicrae Exh. 5, at 1.

27. Stanislaus Wiktor proposes to work full time, 40 hours per week, as news director. Wicrae Exh. 6, at 1. In his written testimony, Mr. Wiktor said he would be responsible for all the station's gathering, production and on-air news operations. *Id.* When cross-examined, Mr. Wiktor said he would only be responsible for national and international news. Tr. 740, 741, 742, 743. He believed his position would be to produce and write a news program with international and national news that would involve prominent people appearing on the program. Tr. 740, 742, Ms. King testified that the station will concentrate on local news. Tr. 628. She stated that Mr. Wiktor will do a newscast focusing on local news and events. Tr. 628-9, 646-7. He will supervise one newscaster, but he cannot hire or fire that person or determine the salary to be paid. Tr. 646-7, 740-1.

28. Mr. Wiktor does not live in the proposed service area. Wicrae Exh. 6. He has two years of broadcast experience with Radio Free Europe and as a television commentator. *Id.*

29. Margaret Engler proposes to work 40 hours per week or full time as program director. Wicrae Exh. 3, at 1. She will be responsible for the traffic department and share programming authority with the other owners. Tr. 684-85. Ms. King will have the final say about programming. Tr. 695. She believes that she will have other duties. Tr. 619. Ms. Engler is listed as treasurer of the applicant but she has never done anything in that position. She is not authorized to sign checks on behalf of the corporation and she has not seen the applicant's budget. Tr. 672, 674. William Crane, a non-integrated owner, is the only person who signs checks. Tr. 672. Ms. Engler is also a director of Wicrae but she does not know what her duties are. Tr. 688.

30. Ms. Engler has lived in the Poughkeepsie area since 1949, all of her life. Wicrae Exh. 3. She belongs to the Farm Bureau, the YWCA, and a local church. Wicrae Exh. 3, at 2.

PCLP

Organization

31. PCLP is a limited partnership with one general partner, Thomas H. Cooper, who holds a 10% equity interest. PCLP Exh. 1. There are ten limited partners: Jean Wells (17.25% equity interest), Victor Demming (8.5%), Samuel T. Allen, Jr. (8.5%), Samuel B. Taylor (8.5%), Garvey Clarke (8.5%), Ronald Morris (8.5%), William Froelich (8.5%), Robert Nash (8.5%), Kelly and Brenda J. Murphy (8.5%) and Harold D. Span (4.25%). PCLP Exh. 1; Information Statement, filed April 4, 1989 by PCLP.

32. Limited partner Jean Wells organized the proposal. The general partner, Thomas H. Cooper, was contacted by Jean Wells at the suggestion of Victor Morris, who was a candidate for the job. Tr. 1007, 1121. By that time the partnership agreement had been prepared and signed by the limited partners (Tr. 978-9, 1078, 1084), the general partner's share had been determined to be 10%. Tr. 979-80, 1061. Mr. Cooper knew none of the limited partners and none knew him. Tr. 1062. Ms. Wells selected Cooper after a 15-30 minute telephone call. Tr. 941, 1049. After Cooper indicated he was interested, Wells gave him the name of the applicant's counsel, Lewis Cohen. Tr. 941-43. Mr. Cooper called Cohen on April 12 or 13, 1987; the application was due to be filed by April 15. Tr. 1049, 1071. Cohen explained the partnership agreement to Cooper and asked him to come to Washington, which he did on April 14, 1987. Tr. 944-6. Essentially, Cooper knew nothing about the project at that point. He did not know who the limited partners were, what his equity would be, or how much the project would cost. Tr. 1062. That day Cooper signed the partnership agreement, helped prepare the application, and was assured that the limited partners would finance the application up to $90,000. Tr. 947-8, 953-6, 985-7.

33. Cooper could not explain why he had agreed to go into business with people he never met and knew little about. Tr. 1074-6. He also said that unlike PCLP's limited partners, he would not have gone into business with a general partner he did not know. Tr. 1072. Mr. Cooper spent about two hours completing and reviewing the application before he signed it. Tr. 1037-8. He also met with the engineer who had completed the engineering. Tr. 956-9. He had no role in selecting the engineer or arranging for an antenna site. Tr. 956-7. Cooper believed that with Cohen's help he would arrange for financing but Wells had already done so. Tr. 964, 967-8, 1147-9. Cooper was uncertain about whether the bank loan would cover construction and the first three months of operating costs. Tr. 1001, 1003.

34. The partnership agreement provides that Cooper is to provide services for his equity. PCLP Exh. 2, at 4. Thus far, he consulted with counsel on April 14, 1989 for two hours about the application, located a place for the public file, prepared three cash call letters, prepared the hearing notice, responded to discovery requests, answered inquiries from limited partners, and prepared for the hearing. Tr. 1019-23, 1025-38, 1041-8. Although he is responsible for the partnership books, his wife has actually maintained them on a day-to-day basis or the work has been done by an accountant. Tr. 1021, 1085.

35. The partnership agreement requires that the general partner open and maintain a bank account, maintain books and records, manage the partnership's affairs including its finances. PCLP Exh. 2, at 7, 12. Cooper did not establish the bank account until June 1988. Tr. 1084-5. Until Cooper opened an account in July 1988 the expenses were paid by PCLP's counsel from funds collected by him in April 1987. Tr. 1086. Ms. Wells paid the $6,000 hearing fee when Cohen told her that his fund did not have enough money to pay it. Tr. 1087. She was later reimbursed. Tr. 1087, 1158.

36. The limited partners receive copies of correspondence and pleadings relating to PCLP's application. Tr. 1153-4. Ms. Wells testified that she tries to review it. Tr. 1155. Mr. Cooper called a partnership meeting in January 1989 to bring the partners up to date on the case. Tr. 1005. Until then, he had met only two limited partners. Tr. 938. Seven of the partners came; those that did not he has never met. Tr. 1005, 938-9.

Integration

37. Thomas Cooper proposes to work full time, 40 hours per week, as general manager. PCLP Exh. 3, at 7-8. He would direct the operations of the station, establish employment policies, oversee programming, sales, technical and accounting operations. PCLP Exh. 3, at 8. Cooper lived in Poughkeepsie or the area from 1949 to 1979 and he would move back to Poughkeepsie if PCLP's application is granted. PCLP Exh. 3, at 1, 7. Cooper participated in various community activities in Poughkeepsie from the late 1960's until 1975 when he moved to Wappinger, New York. PCLP Exh. 3, at 2-7. Cooper has broadcast experience as an announcer, reporter, assistant news director and news director at various radio stations which he gained from June 1967 to August 1978. *Id.* at 6-7. Cooper is a black African-American. *Id.* at 1.

Group

Organization

38. Group is a limited partnership. Leonard R. Kinney is the only general partner and the Mid-Hudson Broadcasting Corporation is the only limited partner. Group Exh. 1. and Exh. 4. Mr. Kinney is also an 8% owner of the limited partner, Mid-Hudson, and he is president and a director of Mid-Hudson. Group Exh. 4. Group's only governing document is its certificate of limited partnership. Group Exh. 1; PCLP Exh. 8. The certificate does not set forth the partners' ownership interests; it only provides that Mid-Hudson will receive 90 percent of the profits. PCLP Exh. 8, at 2; Tr. 1200. Mr. Kinney believes he owns 10 percent of the partnership; but he concedes it is not set forth in any document. Tr. 1199-1200. There is no oral or written partnership agreement. Tr. 1198-9. Mid-Hudson made an initial capital contribution of $1800 to the partnership for which it was reimbursed by its stockholders. PCLP Exh. 8, at 1; Tr. 1207, 1211-12. Mr. Kinney is not obligated to provide any money to Group and he has not; the money to prosecute Group's application has been provided by the individual stockholders. Tr. 1200-1. Mid-Hudson is not obligated, pursuant to the limited partnership certificate, to provide any additional money to the partnership. PCLP Exh. 8, at 2; Tr. 1212.

39. Currently, Mr. Kinney is the general manager of WHVW(AM), Hyde Park, New York, which is licensed to Mid-Hudson. Group Exh. 3, at 2-3. Mr. Kinney stated that his role at the proposed facility will be the same as his role in managing and operating WHVW. Tr. 1221-3. Group intends to use WHVW's tower and adjacent land as a transmitter and antenna site. Tr. 1225-6. Mr. Kinney now conducts Group's business at the business offices of WHVW. Tr. 1228. Mid-Hudson's bookkeeper keeps Group's books and records under Mr. Kinney's supervision. *Id.* Group uses Mid-Hudson's auditors and when Mid-Hudson changed auditors, Group did too. Tr. 1229-30. Mid-Hudson has made its tower available to another applicant. PCLP Exh. 10, Tr. 1237. Mid-Hudson in exchange for making the tower available asked for a right of first refusal on the other applicants' interest in the proposed station. PCLP Exh. 10.

40. Mr. Kinney did not know whether Mid-Hudson could fire him as general manager. He does have an employment agreement with Mid-Hudson that prohibits him from having any connection with a competing radio station in Dutchess County until 1997. PCLP Exh. 9, at 1, 3. He could not have applied for this FM facility without Mid-Hudson's approval. Tr. 1233. Mid-Hudson, which has the right to withdraw from Group, could require Mr. Kinney to withdraw also. PCLP Exh. 9, at 3.

Integration

41. Mr. Kinney proposes to work full time as the general manager of the station. He would supervise all aspects of station operation including programming, personnel, sales, budgeting, and regulatory compliance. Group Exh. 2. Mr. Kinney lives in Clinton Corners, where he has lived since 1957. Kinney Exh. 3, at 2. No showing has been made that Clinton Corners is within the proposed service area of Group's station. Tr. 1251-2. He lived in Poughkeepsie from 1950 to 1952 and from 1953 to 1957. Group Exh. 3, at 1. Mr. Kinney has been a director and member of the American Cancer Society in Poughkeepsie since 1976. Group Exh. 3, at 4-6. He also belongs to the Dutchess County Agricultural Society that

sponsors the Dutchess County Fair. Group Exh. 3, at 8. Mr. Kinney has worked at broadcast stations for 30 years, 15 of which were as a general manager. Group Exh. 3.

Diversification of Control

42. Group's limited partner, Mid-Hudson Broadcasting, intends to divest its broadcast interest. Group Exh. 4; Tr. 1193-4. PCLP has two limited partners with mass media interests. William Froelich, who owns 8.5% equity in Group, is president, a director, 16.5% stockholder in WFMV-FM, New York, New York. Jean Wells, who owns 17.25% equity in PCLP, is local sales manager at WBLS, New York. Tr. 1097-8. Both facilities are less than 75 miles from Poughkeepsie. Wicrae's 11% owner and director, Stanislaus Wiktor, is a director and producer for Radio Free Europe and a political commentator on noncommercial WNYC-TV, New York City. Wicrae Exh. 9; Tr. 756-8. PBL's 40% limited partner owns 100% and is president and director of Cooney Communications Corp., the licensee of WCHN and WKXZ-FM, Norwich, New York and WTKO and WQNY-FM, Ithaca, New York. PBL Exh. 4; Tr. 504.

Auxiliary Power

43. PBL (PBL Exh. 5), Wicrae (Wicrae Exh. 9), PCLP (PCLP Exh. 3, at 8), and Group (Group Exh. 5) propose auxiliary power.

CONCLUSIONS

The Comparative Issue:

Full-time Participation in Station Operation by Owners

44. Three of the applicants, PBL, PCLP, and Group, are limited partnerships. Each of these applicants has one general partner who will be integrated on a full-time basis, 40 hours per week, as the general manager of the proposed station. The fourth applicant, Wicrae, is a stock corporation with ten equal stockholders, five of whom will work at the station. PBL, PCLP and Group claim a 10,000 integration value. The record does not support PBL and Group's claims to a 10,000 integration value but it does support PCLP's claim. Wicrae claims only an integration value of 5,000 which is too small to warrant comparative consideration with the other applicants. Therefore, PCLP is to be preferred for its integration proposal over PBL, Group, and Wicrae. *Miracle Strip Communications, Inc.*, 4 F.C.C. Rcd 5064, 5065, 5065-6, 5067 n. 1 (1989).

45. While Group proposes 100% integration of its general partner, its proposal cannot be credited because the evidence does not support Group's claim that its general partner will be insulated from the limited partner in the day-to-day operation of the broadcast facility. In addition, Group has not indicated what the partners' ownership or equity interests are in the partnership.

46. The PBL partnership has clearly defined its ownership but it has not demonstrated that the partnership will operate as a limited partnership with the limited partners insulated from the daily business of the station. PBL's general partner, Steven Freeman, has not made any of the material business decisions about the proposal. Moreover, his representations about his role in the applicant are not credible.

47. PCLP's limited partners carried out all organizational activities before the application was filed. But after Thomas Cooper became the general partner he generally managed the affairs of the partnership. Moreover, PCLP's partnership agreement insures that the limited partners will be insulated. PCLP is the only applicant that can be credited with full-time integration in station operation by owners. *See Susan L. Mulkey*, 4 F.C.C. Rcd 5520, 5520-1 (1989). These conclusions are based on the following assessment of the facts:

Wicrae

48. Only five of Wicrae's ten equal stock subscribers propose to work at the station. And even those five have not clearly established that their integration will combine control with full-time management. Martha King represents that she will work full time, 40 hours per week, as the general manager of Wicrae's proposed station. But, since Wicrae applied for Channel 241A, she has become a real estate agent. She currently works 12 hours a day, seven days a week. Ms. King did not reveal this job in her written testimony and it did not become known until she was examined about her current commitments at the hearing. While she said she viewed the job as something to do until Wicrae's application is granted, she made no promise to quit in her testimony. From her silence it must be inferred that she will not quit. Ms. King's withholding of her plans is in contrast to Wicrae principal, Margaret Engler, who specifically said she would leave her current job. *See* Testimony of Margaret Engler, Wicrae Exh. 3, at 1. Ms. King has not explained how she would reconcile a job that takes 84 hours a week with her need to work daily for 40 hours per week at the station.

49. Wicrae's John Idema has stated that he would "probably" work full time, 40 hours per week, as sales and real property manager for the station. When he was asked to describe his role he said he would acquire real estate and arrange for studios for the station. After the station "has begun to move along," he explained that he will arrange for the solicitation of advertising. Idema is a real estate agent and his probable job at the station appears to coincide with his current work. When Mr. Idema was asked whether he would make station policy, he said that all the owners, those who will work at the station and those who will not, will decide station policy. By inference, Mr. Idema would be part of that group. There is adequate evidence that Mr. Idema will work at the station and exercise control at least to the extent of his interest in the corporation. If his tentative promise that he will probably work as the sales and real property manager is given the benefit of the doubt, his claim can be credited.

50. Gayle Corbin, another Wicrae owner, promises to work full time, 40 hours per week, as director of community affairs and station promotions. But when she was questioned about her written promise, she indicated that one-half to three-quarters of her time would be spent as office manager. In that job she will oversee typical office duties unrelated to station policy, such as payroll, bookkeeping, and maintaining records. She also believes she may cover community events for the station. Ms. Corbin's testimony about her role does not demonstrate that she will be the business manager of the station and the bookkeeping activities she will perform are not managerial. *See Miracle Strip Communications*, 4 F.C.C. Rcd 5064, *supra*, at 5065. Moreover, her testimony does not indicate that

she will supervise other employees at these tasks of lesser responsibility. Ms. Corbin's testimony overall shows her integration plan to be too indefinite to be credited.

51. Wicrae owner Stanislaus Wiktor also promises to work 40 hours per week, full time, as news director. There is, however, a variance between his written testimony and his oral response to questions about his role. In his direct testimony he makes the claim that he will be responsible for all the station's news gathering, production and on-air news operations. But when questioned directly about that promise, Mr. Wiktor said he would be responsible for only national and international news; he believes the program director will be responsible for local news. But, Ms. King, the proposed station manager, contradicted his testimony and said Mr. Wiktor would do local news and that the station would concentrate on local news. Because Mr. Wiktor has vacillated about the nature of his promise, there is no means of assessing the managerial role he will play at the station. There are two, possibly three, versions of what he plans to do at the station.

52. Margaret Engler promises, in her written direct testimony, to work full time, 40 hours per week, as program director. She stated that she would design and implement all station programming, supervise the staff, and produce sports, agricultural and religious programming. Wicrae Exh. 3, at 1. When questioned about her promise, she said that decisions about programming would be jointly made, although she said she would make some decisions independently. When she was asked to be more specific about the areas in which she would be independent, she stated that she would oversee traffic employees in their day-to-day activities. Tr. 685. Ms. Engler did not explain how her responsibility for traffic was consistent with her promise to devote full time to designing and implementing programming. Traffic functions are usually associated with the advertising department and the business side of the station. Aside from the uncertainty about Ms. Engler's duties at the proposed station, there is some question about whether she will actually exercise control in light of the limited authority she has been given as the corporation's treasurer. By her own admission, she has never done anything in that position; she is not authorized to sign checks; and she has not seen the applicant's budget. William Crane, a non-integrated owner, signs all checks and participates in all decisions. Ms. Engler was also unable to explain whether being a director gave her any responsibilities.

53. While Wicrae only proposes that half of its owners will be integrated into the station operation, among those persons only one, John Idema, proposed integration appears to be unequivocal, although even he characterized his promise as something he would "probably" do. Martha King works 84 hours a week; she withheld that fact, and she has not explained in a timely manner how she will fulfill her integration proposal. Gayle Corbin, Stanislaus Wiktor and Margaret Engler gave materially different versions of their promises to integrate from their written testimony when they were examined about it. It is not possible to assess their promises because of the differences in their representations. Wicrae is entitled to 10% integration credit for Mr. Idema's promise and some additional but lesser credit for the other four proposals.[1]

Group

54. The organization of Group's partnership results in the president, a director and 8% owner of the limited partnership, Mid-Hudson Broadcasting Corporation, acting also as the general partner. That partner, Leonard R. Kinney, now operates and is general manager of Mid-Hudson's Hyde Park station. His relationship with the limited partner makes it impossible for the general partner to be insulated from the limited partner, Mid-Hudson, since the limited partner is directed by the general partner in his dual ownership and management roles. There is one additional problem with Group's proposal. It has not stated what equity interests the partners have; therefore, how much credit Mr. Kinney should receive for his integration promise cannot be assessed from the current documents. The partners intend to share the profits 90-10, with Mr. Kinney receiving 10% as the general partner and part of the 90% for his interest in the limited partner. But the only legal document governing the partnership, the certificate of limited partnership, does not state what his ownership or equity interest is in the partnership. His share of the profits is not necessarily a reflection of his interest. For example, Group's procedures have not always treated Mr. Kinney the same as the other owners of the limited partner. Mid-Hudson's owners are required to contribute capital except for Mr. Kinney who is not obligated to do so. There is no oral or written agreement governing this arrangement. Without some objective confirmation about his ownership share, there is no means of determining how much of an ownership interest Mr. Kinney exercises in Group and any credit awarded would only be speculative.[2]

PBL

55. PBL is a limited partnership with one general partner, Steven Freeman. Mr. Freeman represented during the hearing that he has in all material respects made the decisions involved in organizing PBL's proposal and that he has independently of the other partners managed the business of the partnership. The limited partners in their testimony and the applicant in interrogatories contradict Mr. Freeman's claim of control. Mr. Freeman's testimony is unreliable and the testimony of the limited partners argues against his claim of control. Therefore, PBL's promise that Mr. Freeman will be in control and that the limited partners will not be involved in the day-to-day operation of the station cannot be decided in PBL's favor.

56. Two of PBL's limited partners are well suited to organizing a broadcast proposal for Poughkeepsie and they have provided the needed information and resources to organize it. Matthew J. Cooney, Jr. is president and director of Cooney Communications Corp., the licensee of WCHN and WKXZ-FM, Norwich, New York and WTKO and WQNY-FM, Ithaca, New York. He actively manages those facilities. Mr. Cooney knew about the Poughkeepsie facility and he initiated the proposal. First he spoke with one of his advertisers, Peter deCordova, about investing and in turn they discussed applying with deCordova's brother, Noel, a lawyer in Poughkeepsie. They set out to find a general partner who would meet the Commission's criteria and, in Mr. Cooney's words, "to make it happen." Mr. Cooney advised Noel deCordova about what qualities the person should have. Mr. deCordova asked a woman who is the librarian in his law firm to find someone. She suggested Mr. Freeman.

57. Mr. Cooney arranged for Washington counsel for the partnership in the summer of 1986 and, in August 1986, Mr. deCordova's firm sent that counsel, Jay Baraff, a retainer. Mr. Freeman claimed that he hired Mr. Baraff and that he did so in late October 1986 after talking with him. When faced with the August check, he said he decided to hire Mr. Baraff earlier, before he spoke with him. Mr Freeman explained that there was "some talk" about hiring the firm earlier and that is why the check was sent in August. In the following day's testimony, he said he spoke with the Baraff firm in July or August not October. He said he changed his testimony because he would not have sent a check to Mr. Baraff if he had not retained him. When questioned about his interrogatory responses that also indicated that he contacted the firm for the first time in October, he said he responded to the interrogatories without knowing the answer. It appears that he made up the answers about who hired PBL's law firm in order to convince the Commission that he was in charge.

58. Mr. Freeman also claims that the Baraff firm was sending matters involving the proposal to only him with the exception of one overdue bill. Not only do documents in the record show that that is not the case, but Mr. deCordova testified that he specifically asked Baraff's firm that financial matters be sent to him for review. Mr. deCordova suggested a transmitter site to Mr. Freeman, advised him about settlement negotiations, undertook the filing of tax returns for the partnership, and, contrary to Mr. Freeman's testimony, obtained a letter from the Dutchess Bank and Trust to finance the proposal. Mr. Freeman claimed he obtained the bank letter and that he was known to the bank because its manager was a schoolmate of his. But he could not remember the manager's name and Mr. deCordova said he arranged for the letter from the bank through Paul Mack, who is his personal banker. The record reflects that Mr. Freeman has had no association with the bank. Moreover, the letter was sent by the bank to Mr. deCordova not Mr. Freeman. There is no credible evidence to support Mr. Freeman's version.

59. Mr. Freeman's account of how PBL hired its consulting engineer is equally unreliable. The evidence appears to indicate that the Baraff law firm suggested the engineers, Smith & Powstenko. Mr. Cooney testified that he advised Mr. Freeman that it was a good engineering firm. In addition, PBL stated in interrogatories that Mr. Freeman had asked Mr. Cooney about the firm. Mr. Freeman denies he ever spoke with Mr. Cooney about PBL's engineering firm. He denied that Mr. Cooney advised him. He claimed he thought about another firm which he could not remember, despite the fact that PBL stated in interrogatories that no other engineering firm was considered.

60. Mr. Freeman claims that he undertook arranging for publication of public notice for the applicant and establishment of the public file. Contemporary documentary evidence shows that that was not the case. Notice was given by PBL's local lawyer, Todd Stall, and the public file was assembled by Baraff, sent to Stall, and probably carried to the library by Freeman. Mr. Freeman maintains he asked the limited partners for a 20% interest in the partnership and they claim that he was told that he would receive a 20% interest.

61. Mr. Freeman does not have the customary general partner's liability for debts of the partnership and he has no financial obligation to the partnership except to make a token capital contribution of $2,000. Mr. Freeman asserted that he had worked at Vassar College since 1985. When it was apparent to him that his testimony about his employment at Vassar was inconsistent with his claim for broadcast experience, he changed his testimony and represented that he had worked in the audio-visual department of Vassar College only since September 1987.

62. The evidence also indicates that the limited partners are not going to leave the management of their investment to Mr. Freeman's judgement. They have routinely managed the affairs of the partnership. They have selected legal and accounting assistance and offered advice to Mr. Freeman on everything from settlement talks to engineering. Mr. Freeman's capitulation to the limited partners' views is illustrated by his willingness to sign notes for 20% of the limited partners' advances when Noel deCordova, who had drafted the notes, directed Mr. Freeman to sign them. Such a requirement had been specifically deleted from an earlier draft of the partnership agreement. Mr. Freeman said he believed the notes were in favor of the partnership and he did not know their amounts. He ultimately stopped signing them after attorney Todd Stall told him not to do so.

63. PBL's limited partners have taken an active interest in the affairs of the applicant. But more importantly Mr. Freeman, the sole general partner of the applicant, has not provided a reliable and truthful account of his role. The Commission requires that trustees of licenses provide honest reliable answers to Commission inquiries. Mr. Freeman's testimony in this proceeding cannot meet that test.[3]

PCLP

64. PCLP is a limited partnership with ten limited partners. The general partner, Thomas H. Cooper, owns a 10% equity interest. Mr. Thomas was selected by Jean Wells who owns 17.25% of PCLP's equity. Ms. Wells' interest is more than double the equity held by any other limited partner. In part, her share reflects payment to her for organizing the applicant. Ms. Wells and communications counsel, Lewis Cohen, organized the partnership and established the proposal.

65. Mr. Cooper agreed to become the general partner the day before the application was filed. He was not asked to become the general partner until a day or two before the application was due. From the time Mr. Cooper agreed to become the general partner of PCLP, he has overseen the proposal and the partnership, at least to the extent it has been necessary. He reviewed the application, located a place for the public file, prepared the hearing notice, responded to discovery, answered inquiries from the limited partners, and prepared for the hearing. He has, to some degree, managed the finances of the partnership. Mr. Cooper, who has no financial obligation to the applicant, left all financial matters to the applicant's counsel until he established a bank account. The partnership agreement provides that the general partner establish a bank account. Mr. Cooper did not do so until June 1988, over a year and three months after the partnership was established. Before that counsel maintained an account for the applicant. Nevertheless, Mr. Cooper has not relied on pretense to mask his limited role. He has received a 10% interest for undertaking his position as

general partner and it appears from the few actions he has taken that he has acted on behalf of the partnership independently of the limited partners. There is no evidence that once Mr. Cooper became the general partner that Ms. Wells, or any other limited partner, has been active in deciding how the partnership will be operated. *See Susan S. Mulkey*, 4 F.C.C. Rcd 5520, *supra*, at 5521. PCLP is entitled to be credited with 100% integration for the promise of its general partner, Thomas Cooper to manage its proposed station.[4]

Mass Media Interests

66. PCLP has no mass media interests. While two of its limited partners have mass media interests, they will not exercise control over PCLP and their interests will not be counted. Wicrae has no media interests and its owners have no attributable interests. Group has no attributable media interests. Only PBL has media interests that warrant a demerit. PBL partner Matthew Cooney owns four stations in New York. While Mr. Cooney is a limited partner, the operation of PBL's partnership has not insulated the general partner from the limited partners. Mr. Cooney will not work at the Poughkeepsie station and the service areas of his station and PBL's apparently will not overlap. Nevertheless, PBL will receive a moderate to slight demerit for Mr. Cooney's broadcast interests because he controls the four stations he now owns and he owns 40% of PBL, which is the applicant's largest equity interest. The stations are also in the same state.

Auxiliary Power

67. All the applicants propose auxiliary power.

Environmental Issue

68. Each applicant has established that its proposal will not present an adverse environmental impact.

SUMMARY

69. Only PCLP is entitled to full-time integration credit. Because no other applicant has established that level of integration, PCLP's application will best serve the public interest.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed July 5, 1989 by Poughkeepsie Broadcasting Limited IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the applications of Poughkeepsie Broadcasting Limited (File No. BPH-810331OR), Wicrae Equities Limited (File No. BPH-870424KH), and The Kinney Group (File No. BPH-870415ME) ARE DENIED and the application of Poughkeepsie Communications Limited Partnership (File No. BPH-870415KT) for a construction permit for a new commercial FM station on Channel 241A in Poughkeepsie, New York IS GRANTED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] If Wicrae's qualitative proposal was compared to the other applicants' proposals, its qualitative attributes would not overcome its inferior integration pledge. Engler, King, Idema, and Corbin are long time residents of the proposed service area. They also have participated in activities in the community. Mr. Wiktor has some broadcast experience. Engler, King, and Corbin are women and Ms. King is an African-American.

[2] Mr. Kinney lived in Poughkeepsie for six years, ending in 1957. However, he has, in recent years, participated in area community activities. He has 30 years of broadcast experience. These qualitative attributes are not significant in weighing Group's proposal.

[3] Mr. Freeman has lived in Poughkeepsie for most of his life. He has participated in community activities. In addition, he appears to have had some broadcast experience. He is an African-American. These factors are of no decisional importance in assessing PBL's proposal.

[4] Mr. Cooper will move to Poughkeepsie; from 1949 to 1979, he lived there. He has participated in local activities when he lived there. He has 9 years of broadcast experience and he is an African-American.

[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-560

In re Applications of

RAYNE BROADCASTING COMPANY, INC. — File No. BPH-861125ME

SIMLA B. ELLIS d/b/a SIMLA BROADCASTING — File No. BPH-861125MK

For Construction Permit for a
New FM Station on Channel 294A
in Rayne, Louisiana

Appearances

Grier C. Raclin, Mark Van Bergh, Pamela D. Walther, Kevin S. Dillalo and *Joal R. Hall* on behalf of Rayne Broadcasting, Inc.; *John A. Borsari* on behalf of Simla B. Ellis d/b/a Simla Broadcasting; *Charles E. Dziedzic* and *Jerry Hermele* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: August 16, 1989; Released: August 25, 1989

PRELIMINARY STATEMENT

1. This was initially a seven party case designated for hearing under *Hearing Designation Order* DA 87-1801 (released December 31, 1987), 2 F.C.C. Rcd 7552 (1987), and published at 53 Fed. Reg. 00566 (January 8, 1988).[1] There are now two mutually exclusive applicants for a construction permit for a new FM broadcast station on Channel 294A at Rayne, Louisiana. The remaining applicant parties are: Rayne Broadcasting Company, Inc. ("RBC") and Simla B. Ellis d/b/a Simla Broadcasting ("Simla").

2. The following issues which were set under the *Hearing Designation Order* remain to be decided:

(a) To determine which of the proposals would on a comparative basis, best serve the public interest.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

The Bureau had specified financial qualification issues against former applicant Cart Broadcasting Company, Inc. which became moot by dismissal. *See Order*, FCC 89M-945, released March 23, 1989. Similarly, financial qualification and related misrepresentation issues were added by the Presiding Judge against former applicant Rayne FM, Ltd. *See Memorandum Opinion and Order*, FCC 88M-2310, released July 19, 1988. Those issues also became moot by the applicant's voluntary dismissal. *See Order*, FCC 88M-3179, released September 26, 1988. A sole financial qualification issue also was added by the Presiding Judge against RBC but that qualifying issue against a remaining applicant was resolved in advance of trial by summary decision. *See Order*, FCC 88M-2367, released July 22, 1988.

3. A prehearing conference was held on March 8, 1988, in which procedural and trial dates were set. *See Order*, FCC 88M-660, released March 10, 1988. Integration and Diversification Statements were exchanged on January 29, 1988, and discovery commenced on February 12, 1988. *See Order Prior to Prehearing*, FCC 88M-066, released January 13, 1988. Written frozen testimony was exchanged on August 26, 1988, a final joint engineering exhibit was submitted on September 1, 1988, and hearings were held on September 13, 14, 15 and 16, 1988. A posthearing conference was held on September 22, 1988, and the record was closed on December 21, 1988. *See Order*, FCC 88M-4355, released December 22, 1988. The Presiding Judge established January 27, 1989, and February 24, 1989, as the dates for filing Proposed Findings Of Fact And Conclusions Of Law and Reply Findings Of Fact And Conclusions Of Law, respectively. *Id.* On Joint Motion filed timely, the respective dates for filing findings and conclusions were extended to February 6, 1989, and March 3, 1989. *See Order*, FCC 89M-207, released January 23, 1989. The Bureau timely filed its brief on comparative coverage, the applicant parties timely filed their respective briefs on all issues, and the case is ready for an initial decision.

4. There are no qualifying issues to consider. Therefore, this decision will consider only the comparative issues in accordance with the Commission's standards at 47 C.F.R. §1.267(b) (initial decision to include findings of fact and conclusions of law as well as reasons or basis therefore). The burdens of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C.A §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *S.E.C.*, 450 U.S. 91, 101 S.Ct. 999, 1007 (1981). References to exhibits shall be: "RBC Exh. _____ for Rayne Broadcasting Company, Inc. and "Simla Exh. _____ " for Simla B. Ellis d/b/a Simla Broadcasting. Testimony is cited where practicable by the name of the witness followed by the transcript page number, *e.g.*, "Smith, Tr. 0001." References to Proposed Findings of Fact and Conclusions of Law are designated "PFC" and references to Reply Findings and Conclusions are designated "RPFC."

FINDINGS OF FACT

5. Since the two applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945).

COMPARATIVE ISSUES

Media Diversification

6. RBC is a Louisiana stock corporation that is capitalized with 100 shares of voting stock. Ms. Melinda B. Lizotte ("Lizotte") is president, a director and a 50% voting shareholder (500 shares). Mr. Wendell M. Byers is vice-president, secretary, a director and a 50% shareholder (500 shares). There are no agreements for any third party to acquire an interest in RBC and there are no agreements between Lizotte and Byers for acquiring the stock of one or the other. (RBC Exh. 1; Byers, Tr. 582, 599; Lizotte, Tr. 753.) On March 23, 1988, Ms. Lizotte sold her stock and resigned as a director in KSIG Broadcasting Company, Inc. ("KSIG"). Now neither RBC, nor Lizotte, nor Byers has any ownership interest in any medium of mass communication. (RBC Exhs. 2, 3.)

7. Simla is a sole proprietorship under the proposed direction and control of Ms. Simla B. Ellis. (Simla Exh. 1.) As discussed below, her husband Charles F. Ellis is an experienced engineer and a knowledgeable broadcaster who has participated significantly in the preparation of Simla's application, the selection of a site and in the providing of financing. (Simla Exh. 9.) From March 1985 to October 1986, Ms. Simla Ellis was the owner of 51% of the voting stock, president, director and general manager of Maurice Broadcasting, Inc. ("MBI"). MBI is licensee of FM Station KFXZ at Maurice, Louisiana. Ms. Ellis sold her interest in MBI in October 1986, one month prior to filing her application in this case. (Simla Exh. 2.) Mr. Ellis has no ownership interest in MBI. Neither Mrs. Ellis nor Mr. Ellis has any ownership interest in any medium of mass communication. (Simla Exh. 2; RBC PFC at 28.)

Comparative Coverage

8. Under the comparative issue set in the *Hearing Designation Order*, the parties were required to submit comparative coverage evidence in order to permit consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural services of Grade B or greater intensity. The findings are based on a Joint Engineering Exhibit that was received in evidence on September 16, 1988. (Tr. 1017).

Areas and Populations

9. The following are the total areas and populations which the applicants will cover within their respective 1 mV/m contours (Joint Engineering Exh. 1):

Applicant	Area (sq. km)	Population (1980 census)
Rayne Broadcasting Company, Inc.	1,800	88,269
Simla Broadcasting	1,848	79,959

(Joint Engineer Exh. 1.) All of the areas and populations that the applicants propose to serve already receive five existing aural broadcast services during the day and right.

10. RBC and Simla will serve a substantially identical sized area. RBC will serve 8,310 more people than Simla resulting in superior population coverage by a factor of 9.62%. Neither applicant proposes to serve any white, gray or underserved area. Simla contends that by bringing a fifth FM service to an area of 81 sq. km with 511 residents, she should receive credit for serving an "underserved" area. (Simla RPFC at 6; Joint Engineering Exh. 1 at 4.)

Auxiliary Power

11. RBC and Simla each proposes to install auxiliary power equipment at the studio and transmitter sites in order to keep the respective proposed stations on-the-air in the event of a local power failure. (RBC Exh. 4; Simla Exh. 4.)

STANDARD COMPARATIVE ISSUE

Rayne Broadcasting

12. The findings of RBC's diversification at Para. 6, *supra*, are incorporated here. The corporation was formed through the filing of articles of incorporation with the Secretary of State on November 17, 1986. (Lizotte, Tr. 747.) Prior to the filing date, Lizotte and Byers executed an Initial Report of RBC on October 14, 1986, that reflected Lizotte and Byers as first directors and officers of RBC. (Cart Cross Exh. 1; Lizotte, Tr. 747.) RBC's application was filed on November 25, 1986, and disclosed in Section II that Lizotte was president, a director and a 50% owner of voting stock, and that Byers was vice-president, secretary, a director and a 50% owner of voting stock. The stock was issued (500 shares to Lizotte and 500 shares to Byers) on March 5, 1988. (Cart, Cross Exh. 3; Lizotte, Tr. 753.)

13. Lizotte learned about the allocation of a new FM frequency for Rayne from her brother, Mr. Michael Basso ("M. Basso"). (Lizotte, Tr. 694.) Byers first learned of the allocation through a communications attorney who was also counsel for station KJCB where Byers had been employed. (Byers, Tr. 576.) Lizotte knew Byers for many years as an employee for her father, Mr. Louis M. Basso, Jr. ("L. Basso"). (Lizotte, Tr. 695.) In early 1986, Byers was meeting with L. Basso and Lizotte when L. Basso was seeking to purchase station KFXZ. (Lizotte, Tr. 696.) At about the time that those purchase efforts failed, Lizotte called Byers by telephone to discuss Byers' participation in the Rayne application. Thereafter, Lizotte met alone with Byers to firm up a proposal for Rayne. (Lizotte, Tr. 699-701.)

14. In connection with the corporate formation of RBC, M. Basso was a witness to Lizotte's signature on the articles of incorporation. (Cart Cross Exh. 1; Lizotte, Tr. 782; Byers, Tr. 605.) There was no evidence that L. Basso was present or that M. Basso was giving advice or doing

anything more than witnessing the signatures of Byers and Lizotte. Another witness, Ms. Lisa Stout, was identified as an attorney's secretary. (*Id.*) The fact that a legal secretary was one of three witnesses adds circumstantial corroboration to the finding that M. Basso was only witnessing signatures on the articles of incorporation. This finding is further corroborated by the appearance of a Notary's signature under the signature of Lizotte and Byers and M. Basso and Ms. Stout. (Cart Cross Exh. 1.)

15. At the time of the hearing, there were cash deposits in the amount of $16,600 made to the account of RBC: $8,300 was attributed to Byers and $8,300 was attributed to Lizotte. Also, each signed the same note for a $20,000 bank loan to RBC. (RBC PFC at 3.) The $16,600 in seed money was loaned to RBC by Byers and Lizotte. (Lizotte, Tr. 721.) But only Lizotte has made a direct cash outlay; Byers obtained the funds for his $8,300 cash contribution through a loan from Lizotte. (Byers, Tr. 592-94; Lizotte, Tr. 721-22, 725.) Byers did not seek another source for a loan of the $8,300; he used Lizotte as the sole source. (Lizotte, Tr. 726-27.) The loan from Lizotte to Byers is interest bearing but it has no date certain for payment. Lizotte expects payment from Byers after the CP is granted and the station begins to receive earnings. (Lizotte, Tr. 727.) There also was $20,000 in cash deposited to RBC's checking account as a result of the $20,000 loan from the Crowley Bank on which Byers and Lizotte were the sole signatures. (Lizotte, Tr. 723.) Legal fees and engineering fees were paid directly by Lizotte out of the RBC bank account. (Lizotte, Tr. 724.) Neither M. Basso nor L. Basso have directly paid any of RBC's expenses. Byers did not make any cash payments for his 500 shares of stock but Byers believes that he paid for his stock in unspecified services rendered. (Byers, Tr. 591.)

16. The Basso family was considered as a source for funding and L. Basso lent personal assistance. KSIG Broadcasting Company ("KBC") is a radio broadcast licensee for FM station KTQQ at Sulphur, Louisiana. KBC is owned and controlled by L. Basso. M. Basso, L. Basso's son and Lizotte's brother, is actively involved in the management of KBC. (RBC Exh. 6.) Lizotte owned a 10% interest in KBC which she sold back to the company in April 1988. (Lizotte, Tr. 755.) It was KBC which advanced Lizotte $16,600 from time to time against her shares of KBC stock. (Lizotte, Tr. 754.) The delivery of her shares of KBC stock in April 1988 cancelled the debt; but there was no promissory note between Lizotte and KBC. (Lizotte, Tr. 756.) The KBC stock was valued at $36,000 and it was that amount for which Lizotte received credit. (Lizotte, Tr. 771-72.) Thus, it was as a result of Lizotte's father's controlling interest in KBC that Lizotte was funded in the amount of $16,600 for seed money to prosecute RBC's application.

17. There was also a $20,000 bank loan that L. Basso assisted in obtaining for RBC. L. Basso submitted written testimony dated September 10, 1988, which states that he "suggested" to Lizotte and Byers that they contact the 1st National Bank of Crowley about financing and that L. Basso agreed that he would act as guarantor for the loan if that were required. (RBC Exh. 6.) The Crowley Bank has an option to require L. Basso's personal guaranty and the pledge of L. Basso's stock in KBC if a guaranty and/or security is later deemed necessary. Specifically, L. Basso testified that he did not participate in discussions or in negotiations with the Crowley Bank and he has no present knowledge whether or not the Crowley Bank will ever require his personal guaranty or the pledge of his KBC stock. (RBC Exh. 6.) However, it is noted that the cash value of Lizotte's KBC stock to KBC was $36,000 which was the approximate total of the $16,600 advance from KBC and the $20,000 loan from the Crowley Bank. (Lizotte, Tr. 771-72.) This assistance by L. Basso was consistent with other guarantees he had made for the obtaining of loans for Lizotte's siblings. (Lizotte, Tr. 782.)

18. Byers did not participate in the selection of RBC's engineer and it was Lizotte's idea to use the Crowley Bank. (Byers, Tr. 584-85, 637-38.) Byers testified that except for a brief time in the 1950's when he worked for L. Basso, he had no prior business dealings with Lizotte or the other members of the Basso family. (Byers, Tr. 584.)

19. Byers testified that he personally loaned RBC the sum of $8,300:

> Q. Have you contributed at all to the payment of RBC expenses?
>
> A. I loaned them $8,300. I signed a note at the bank for $10,000 (sic) based on my financial statement that I submitted to Mr. Seale. - - - The $8,000 was before we got the money from the bank. The $8,000 was my personal money that I had loaned to take care of expenses until we got the $20,000 from the bank.

(Byers, Tr. 592.) That testimony was not true and correct and was misleading. Ms. Lizotte later testified accurately on cross-examination that the $8,300 credited to Byers was her money that she had borrowed from KBC against her stock in KBC which she later transferred to KBC. *See* Para. 14, *supra*.

20. Lizotte and Byers consult with each other on decisions regarding RBC. They jointly prepared the non-engineering portion of RBC's application. They jointly located and selected RBC's transmitter site, and created RBC's business plan. M. Basso assisted in obtaining a transmitter site by accompanying Lizotte on a visit to a site owner he knew who was difficult to understand. (Lizotte, Tr. 762.) But there is no evidence that M. Basso was instrumental in obtaining the site. Byers prepared the Model EEO program. (Lizotte, Tr. at 632, 635, 639, 663-64, 763-64.)

21. The evidence also establishes that L. Basso participated in settlement negotiations. L. Basso testified that he met with Charles and Simla Ellis and with Mrs. Cart, a principal of a former applicant. (L. Basso, Tr. 205.) Basso asserts that he was serving as "an arbitrator" and that he participated in discussions at his daughter's request. (L. Basso, Tr. 205-206.) Mr. Byers testified that he thought that Mr. Basso was involved in trying to reach a settlement and that he (Byers) perceived Basso as being "an outside third party trying to get this thing settled before a hearing." (Byers, Tr. 583.) But Byers was "sure" that Basso would have no role in the station. (*Id.*) Lizotte testified that her father sat in on settlement meetings and made "suggestions." (Lizotte, Tr. 731.) Also, with Ms. Lizotte in the room, he would ask questions of the other applicants. (Lizotte, Tr. 732.) Lizotte said that her father was available for discussions whenever she called and his role in negotiations was an "active" one. But he never

made settlement offers on his own and only made suggestions to Lizotte on terms. (Lizotte, Tr. 733-34.) It is concluded as a fact finding that L. Basso participated in settlement negotiations as an advisor to his daughter, Ms. Lizotte. But he did not negotiate with the parties.

RBC's Integration

22. Melinda Lizotte, a caucasion female, is proposed to work at least 40 hours per week as the station's general manager. She will be responsible for the overall supervision of the management and operation of the station, including supervision of the entertainment programming, news, hiring, public service and community affairs programming. She also will manage the station's overall financial planning. All management personnel at the station will report to Ms. Lizotte and she will terminate her current employment as an executive sales representation for Louisiana State Newspapers. (RBC Exh. 2 at 1, 3.)

23. Ms. Lizotte resided within RBC's proposed service area from 1955 to 1987. She presently lives outside, but in close proximity to, the contour in Lafayette, Louisiana. She promises to move to Rayne if she is awarded the grant. (RBC Exh. 2 at 1-2.)

24. Ms. Lizotte has participated in the following civic activities in Rayne or in RBC's proposed service area. In 1986, she was co-chairperson and co-founder of the Thanksgiving Community Kitchen for Acadia Parish. This project served free Thanksgiving dinner to approximately 2,000 needy persons. (RBC Exh. 2; Lizotte, Tr. at 672-73.) She has been involved with the Rayne Frog Festival for many years, and in 1986, Ms. Lizotte was a participant in the Festival, which promotes the Rayne frog industry. (RBC Exh. 2; Lizotte, Tr. at 675.) Since 1986, Ms. Lizotte has been a member of the Rayne Chamber of Commerce. She served as its representative at the Rayne Christmas Trade Show in August 1986. (RBC Exh. 2; Lizotte, Tr. at 688.) She has been a member of the American Business Women's Association ("ABWA") since 1986 which meets once a month. In 1988, she was a member of the ABWA's Easter Basket Raffle fundraising committee. (RBC Exh. 2; Lizotte, Tr. at 689.) In 1985, she was a coordinator and member of the Queen's Ball Committee for the International Rice Festival Committee, which promotes the rice industry, the area's primary economic industry. (RBC Exh. 2; Lizotte, Tr. at 675, 681.) Ms. Lizotte was a member of the Crowley Business and Professional Women's Club from 1985 to 1987, serving as the organizer of the Miss Crowley Pageant. (RBC Exh. 2.)

25. Ms. Lizotte is a member of St. Michael's Parent-Teacher Organization, attending monthly meetings in Crowley, Louisiana, and having principal responsibility for the annual school fair. Ms. Lizotte participated in the Rayne Trade Show in 1986, working in the welcoming booth as a representative of KSIG Broadcasting. (RBC Exh. 2.) Ms. Lizotte is a member of Beta Sigma Phi, a women's civic club which meets once a month in Crowley, Louisiana. (RBC Exh. 2.)

26. Ms. Lizotte has 17 years of broadcast experience. From 1971 to 1988, she was employed at Station KSIG(AM) at Crowley, Louisiana in the following capacities: traffic manager (1971-78); account manager (1979-84); sales representative/account executive (1984-87); sales manager (1988). She also was employed in 1987 as account executive for Station KTDY at Lafayette, Louisiana.

27. Wendell Byers, a male Afro-American, is proposed to work at least 40 hours per week as general sales manager, creative director and producer of the station's advertising and promotion. He will supervise sales staff and sales accounts and he will share in the responsibility with Lizotte for developing community programs and in the station's decision-making. Byers will terminate his employment at KQXL. (RBC Exh. 3; Lizotte, Tr. 713.)

28. Byers claims residency for Lafayette, Louisiana at a location established as being on the fringe of RBC's proposed service area. (RBC Exhs. 3, 5.)[2] The Lafayette address is 2700 Ambassador Caffery which is the residence of his financee. (Byers, Tr. 572.) The Presiding Judge determined in bench rulings, while observing witness demeanor, that Wendel Byers' residence will be considered to be "on the fringe" of RBC's contour. *See Memorandum Opinion and Order*, FCC 88M-3829, released November 10, 1988. Based on the evidence of record and related rulings, Byers is found to have resided from 1982 to the date of his testimony on September 15, 1988, in Lafayette, Louisiana on the fringe of the coverage contour of RBC's proposed service area. Byers previously resided in Crowley, Louisiana from 1934 to 1967, and Crowley also is located within RBC's proposed service area. Byers will move to Rayne if RBC's application is granted. (RBC Exh. 3.)

29. Byers was active in civic affairs in the Rayne area in the early 1960s until 1967. (RBC Exh. 3.) In 1967, Byers moved to Houston, Texas. He later moved to New York and then to Crowley, Louisiana in 1982. (RBC Exh. 3.) On his return to Louisiana in 1982, Byers resumed participation at the United Way of Lafayette. (RBC Exh. 3.)[3]

30. Byers was a member of the Crowley Masonic Lodge and served as its Director of Crowley-Rayne-Lafayette affairs during 1983-84. He was a member of the Board of Deacons of the Bethel Methodist Church in 1983 and has been active in the Church's fundraising efforts. In 1984, Byers was a volunteer for the Lafayette March of Dimes; he actively solicited funds. Since 1960, Byers belonged to the Lafayette Branch of the NAACP but his participation in civil rights efforts is credited only for 1982-88. Byers was an active member of and fundraiser for the Lafayette Chamber of Commerce since 1982. He also served on the membership Committee of the United Way of Louisiana in 1982-87. (RBC Exh. 3 at 2.)[4]

31. Mr. Byers has 20 years of media experience, 11 years of which were in the broadcasting industry. From 1967 to 1970, he was employed as a media planner/account executive for Graphics Group, Inc. in Houston, Texas. From 1970 to 1973, he was marketing manager/consultant at the Mutual Broadcasting Company in New York City. From 1973 to 1979, he was an advertising account executive for the Johnson Publishing Co. (*Ebony)* in New York City. From 1979 to 1982, Byers was the mid-west advertising manager for Johnson Publishing Co. From 1982 to 1987, he was national and local sales director at Station KJCB in Lafayette, Louisiana and from 1987 to the present he has been serving as national sales director at Station KQXL(FM) at New Roads, Louisiana. (RBC Exh. 3 at 3.) Byers is committed to resign his position at KQXL(FM) if RBC is awarded the grant. (*Id.*)

Simla Broadcasting

32. The findings of Simla's diversification at Para. 7, *supra*, are incorporated here. Simla proposes to own and operate the station as a sole proprietor doing business as

Simla Broadcasting. (Simla Exh. 1.) Her husband Charles Ellis is an experienced broadcast engineer who is knowledgeable about the broadcast business.[5] (Simla Exh. 9.) He prepared the engineering portion of Simla's application. (C. Ellis, Tr. 840.) He assisted Simla in the selection and obtaining of a transmitter site, including preparation of a lease. (Simla PFC at 43; C. Ellis, Tr. 865-66.)

33. Charles Ellis also contributes a substantial amount of the monies used to prosecute the application. Simla pays the bills from a joint checking account which consists almost entirely of funds originating jointly. Simla admits she has not contributed separately any significant funds to the account. (S. Ellis, Tr. 966.) There is no agreement among the Ellises to repay Charles those funds if Simla wins a grant. (S. Ellis, Tr. 967.)

34. Charles Ellis also participated significantly in negotiations for a possible settlement which failed to materialize. While Charles Ellis would not adopt the word "participate" he admitted speaking on the telephone to representatives of competing applicants about settlement. (C. Ellis, Tr. 873-74; Simla Exh. 9.) He also made recommendations to Simla on offers she might receive and on offers she might make. (C. Ellis, Tr. 874.) Here Charles Ellis testified: Q. "Have you ever made recommendations to Simla on offers she might have received or offers she might make?" A. "We certainly discussed things, yes." Q. "Have you ever made a recommendation to Simla regarding offers she might make or offers she has received." A. "Have I ever said specifically, Simla, you need to take this offer or you don't need this, - - no, I have not done that." (C. Ellis, Tr. 874.) From this testimony it is concluded that Charles and Simla Ellis agreed to parameters of settlement but Simla or her attorney gave the final word on specific rejections and proffers *vis - a - vis* other applicants and their counsel. But Simla Ellis admitted without equivocation that Charles Ellis participated in settlement discussions. (S. Ellis, Tr. 953-54.) The conclusion drawn from Simla's explanation on the scope of participation is that Charles participated on an equal basis with Simla. (S. Ellis, Tr. 954-55.)

35. While Simla seeks in its RPFC to portray Charles Ellis in a strictly advisory role, the responses of Charles Ellis to specific questions are too evasive to find him in a lesser role than portrayed in his wife's testimony cited above. For example, Simla relies on only a portion of an answer in its reply (Simla RPFC at 14):

> Tr. 875: A - Did I participate in arguing some points of settlement? No, I did not.

But the complete Q and A are as follows:

> Q. Have you ever initiated a phone call, the topic of which principally was settlement of this proceeding?
>
> A. I want to answer that this way, so this will be a little clearer, it may be that Simla said, Charles would you get Lou Basso on the line I want to talk with him about this, that occurs I may have done it. Did I participate in arguing some points of settlement? No. I did not.

(C. Ellis, Tr. 875.) The totality of the evidence referred to here relating to Charles' involvement with Simla's proposal requires rejecting any assertion or suggestion that Charles merely placed phone calls for Simla or just relayed messages. Mr. Ellis' own testimony illustrates his knowledge of settlement discussions and how on one occasion he used his experience and took the lead.

> Q. Did you ever participate in a conference call with any of the other applicants in which both you and your wife were on the phone at the same time?
>
> A. Yes.
>
> Q. Did you ever volunteer comments in that conversation?
>
> x x x
>
> Lou asked me to get on the phone one time when he and Simla were talking - -
>
> Q. Lou being?
>
> A. Mr. Basso. I got on the phone and Lou said well, what's going to happen if this doesn't get settled or some question to that effect, as I do with a lot of clients when they get in this situation, I went through the steps as I understood them about you know, if this doesn't get settled here then there is a hearing, then there is this and then there is appeals and this could go on forever and so forth.
>
> I made that kind of speech to Mr. Basso and Simla jointly at one time, that I remember clearly, pretty clearly.

(C. Ellis, Tr. 875-76.) He also accompanied Simla on a visit to former applicants where he participated in discussions about projected next moves of "Lou and Melinda" [RBC]. (C. Ellis, Tr. 877-78.) These are not the activities of a mere advisor. Charles Ellis had committed his time, expertise and money to Simla's project and his actions as an active participant in framing a settlement are consistent with a person having that large a stake in the venture.

36. There is additional circumstantial evidence that is probative of Charles Ellis' abilities and motive to share in the control of the Simla venture. Simla Ellis at one time owned 51% of the licensee of Station KFXZ which she sold in 1986. (*See* Para. 7, *supra.*) Charles Ellis owned 80% of the licensee of Station KJJB in Eunice, Louisiana. (Simla Exh. 9.) In order to keep their ownership interests separate and apart and apparently to avoid common marital ownership, Simla and Charles had executed mutual donations *inter vivos* in 1983 renouncing their respective community interests in KFXZ and KJJB. (Simla Exh. 9.) But no such instrument was executed for the Rayne station. (*Id.*) Thus, circumstances of using Charles' funds to prosecute the application, which in part were monies realized by the sale of his 80% in KJJB, the fact that Charles has demonstrated in the past as having an interest in owning a broadcast station, and the fact that no means were taken to prevent common ownership of the Rayne station property as husband and wife, are circumstances which are probative of Charles' motive and intent to

share in control. The acts of participation by Charles Ellis, detailed above, are evidence of the exercise of that interest and control.

Simla's Integration

37. Simla Ellis is a female who was born in the Figi Islands which are in the South Pacific Ocean, 2,000 miles west of Hawaii and 1,600 miles northwest of Australia. (Simla Exh. 3.) She was educated in New Zealand and she attended Brigham Young University at Hawaii from 1969 to 1971. She worked in the Peace Corps where she met her husband Charles. (*Id.*) She moved to the United States and she became a resident of Lafayette, Georgia in 1975, and a naturalized United States citizen in 1978. (*Id.*)

38. Simla Ellis will work 40 hours per week as general manager of the proposed station. In that capacity she will plan strategy, hire personnel and supervise support staff in the technical, programming, sales and administrative areas. She will directly supervise compliance with the station's policy on public affairs and related community interest matters. (Simla Exh. 3.)

39. Simla Ellis has resided since April 1978, in Lafayette, Louisiana at an address which enables her to travel by car to Rayne in 28 minutes. (Simla Exh. 3.) Simla contends that her proposed contour is less than one mile from the Lafayette city limits. (SimlA PFC AT 46; Joint Engineering Exh. 1 at Fig. 1.) There is no representation in Simla's frozen written testimony that she resides within or on the fringe of her proposed service area. Simla's claim of local residence fails for lack of proof.[6]

40. Simla Ellis constructed and operated radio station KFXZ in Maurice, Louisiana from March 1985 to October 1986. She was 51% shareholder, president and director of the licensee company, Maurice Broadcasting, Inc. She sold her ownership interest in Maurice Broadcasting to her minority shareholder, Ms. Sharon Le Deaux, and resigned her position as general manager of Station KFXZ in June 1986. (Simla PFC at 46; Simla Exh. 2.) Charles Ellis also assisted Simla's efforts in obtaining and operating the Maurice station. He prepared the engineering portion of the application. (C. Ellis, Tr. 843.) He made repairs to the transmitter, prepared a modification to the application and he supervised the tower construction. (C. Ellis, Tr. 845-46.) He ran all aspects of the station in the last month before its transfer to Ms. Le Deaux. (C. Ellis, Tr. 855.) This evidence is corroborative of the practice of Simla and Charles Ellis to share operational control of broadcast ventures in which either is involved.

CONCLUSIONS OF LAW

41. Section 307(b) of the Communications Act of 1934, as amended, (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standard in determining which applicants meet the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

42. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communication, or diversification, and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-607 (D.C. Cir. 1984) (process of comparative evaluation). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership into management which may be enhanced by local residence, civic activities, broadcast experience and, if applicable, minority and female gender preferences. *Id.* There are no basic qualifying issues to consider. But the *bona fides* of both integration proposals have been challenged and will be considered. *See N.E.O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986) (non-owner husband found to control 100% owner wife in all decisions and therefore applicant not credited with integration). Also, there are issues of diversification to consider.

Diversification

43. Maximum diffusion of control of the media of mass communication is a factor of primary significance in the comparative adjudication process. *See Policy Statement, supra* at 394. If L. Basso is shown to be in control of RBC's application, then L. Basso's media interests in Station KTQQ at Sulfur, Louisiana will be attributable to RBC. The relationship of Lizotte's brother, M. Basso, is too remote to warrant further diversification analysis.[7] Simla and her husband Charles have timely divested themselves of all media interests.

44. L. Basso assisted his daughter Melinda Lizotte by offering to guarantee and pledge security for a bank construction loan if the bank required it. L. Basso was a friend of the bank officer who gave the bank's commitment. But the evidence establishes that Lizotte made the proposal and negotiated the letter. It is recognized that serving as guarantor and/or pledging property to secure a loan goes much further than an introduction to a bank official. But there is no evidence that L. Basso was using his position as parent/guarantor to control the application. *Compare Washoe Shoshone Broadcasting*, 3 F.C.C. Rcd 3948, 3955 (Review Bd 1988) (Krone had dictated the crucial terms of governing documents).

45. The evidence must be considered as a whole to determine whether L. Basso exercised "dominion and control" over RBC's application. *Id.* Lizotte and Byers prepared the non-technical portions of the application and secured a transmitter site. Lizotte obtained the bank letter, with the assistance of her father as noted above, and she directed the settlement negotiations for RBC with assistance from her father as she requested such assistance. The evidence of L. Basso's assistance with a bank loan, if needed, and his requested assistance at negotiations does not show that L. Basso will have an ownership interest in RBC or that L. Basso will be in a position to actually or potentially control the station. *Creek Country Broadcasting Co., et al.*, 31 F.C.C. 2d 462, 467-68 (Review Bd 1971). Also, the family relationship of Lizotte to her father is not sufficient to show control. *Jimmie H. Howell, et al.*, 46 F.C.C. 2d 50, 54 (Review Bd 1974); *Cannon's Point Broadcasting Co.*, 93 F.C.C. 2d 643, 651-52 (Review Bd 1983). Even where a father agreed to loan construction funds to a son based on an unsecured noted, the Commission required direct evidence of an exercise of control. *Michael S. Rice, et al.*, 9 F.C.C. 2d 217, 219 (Review Bd 1967). Such direct evidence is lacking here. The circumstantial evidence of possible control analyzed above does not establish that L. Basso controlled or would control RBC's application or the station. Therefore, none of L. Basso's media interests are attributed to RBC.

Integration Proposals

Rayne Broadcasting

46. Simla argues that RBC's proposal should be rejected because Byers serves merely as an accommodation so that RBC could obtain a minority preference. Also, Simla contends that L. Basso and his family controls the prosecution of RBC's application. Simla relies on the late issuance of RBC's stock after the exchange of integration statements, the tracing of the source of funding to the Bassos, and the comparatively passive role that Wendell Byers played in the organization of RBC. (Simla PFC at 71-73.)

47. Byers was an experienced broadcaster who had worked for the Basso family and who had an interest in owning a broadcast station. The circumstance of Ms. Lizotte approaching him as a candidate to participate with her in seeking the Rayne station is plausible and does not alone support an inference that he was only sought for his qualifications for a minority preference. But then the RBC proposal starts to unravel. The evidence establishes that Byers did not pay for his 50% stock interest and that the seed money to prosecute the application was provided by Ms. Lizotte. Since the note made by Byers in favor of Lizotte for $8,300 had no due date, it was no more than an accommodation. Lizotte may be made whole if RBC is awarded the license and the station operates profitably. But at the time of trial there was no legally enforcement obligation. Also, the parole explanation offered by Byers is rejected because he did not have the facts straight in his direct testimony. It was not until he was confronted with evidence of loans on cross examination that he admitted he had not paid cash. *See* Para. 19, *supra*. Thus, it is concluded that the inconsistent evidence presented by RBC through Byers has failed to prove by a preponderance of the evidence that Byers was a *bona fide* participant in RBC's proposal. *See Steadman* v. *S.E.C.*, *supra*. RBC is entitled to credit for only 50% of integration into management by ownership because ownership was only shown to be with Lizotte.

48. The fact that Byers did not receive any stock certificate until after the integration statements were exchanged is substantial circumstantial evidence that is probative of the conclusion that Byers was not a firmly established principal of the RBC corporate proposal. RBC's integration statement that was exchanged on January 29, 1988, disclosed that Wendell Byers was an "officer, director and 50% shareholder." Yet stock certificates were not issued until March 5, 1988. (Cart Cross Exh. 3). Also, there is no written agreement in the record establishing that Byers was entitled to any shares of RBC stock. (Lizotte, Tr. 753.) The absence of timely supporting documentary evidence on organization and structure is also considered in the context that Byers dissembled in his testimony concerning his commitment to fund the proposal as analyzed in Para. 19, *supra*. Thus, the evidence as a whole does not show Byers to be committed to the enterprise.

49. RBC relies only on the representation in its integration disclosure and testimony to establish that Byers was a 50% shareholder when the proposals were exchanged in January 1988. That testimonial self-serving evidence is negated by the objective fact that expected contemporaneous documentary evidence in the form of subscription agreements and/or stock certificates are lacking. The Commission has held that all basic arrangements which are needed to pursue an application should be completed before a hearing commences. *Dutches Communications Corp.*, 101 F.C.C. 2d 243, 245 (1985). This principle is particularly applicable with respect to matters which are within the control of the applicants such as the form under which the business is to be conducted. Since applicant parties have an interest to litigate based on their best integration proposal, there must be a date certain for choosing a final business form. The Commission's policy has been to freeze comparative positions at the cut-off date for amendments as of right, *i.e.*, the "B" cut-off date. *Alexander S. Klein*, 86 F.C.C. 2d 423, 434 (1981). There is some flexibility provided for presiding judges, such as permitting the definitive integration proposal to be frozen on the date that integration statements are exchanged. But the principle remains inflexible that "applicants are not entitled to participation credit for proposals that are uncertain and indefinite on the date the proposals are required to be set forth." *Northland Communications*, 100 F.C.C. 2d 914, 917 (Review Bd 1985), *aff'd* 60 Radio Reg. 2d (P&F) 776, 777 n. 3 (1986) (Presiding Judge may set date for complete integration proposals). The appropriate cut-off date can be set by the Presiding Judge:

> [W]e will not consider a proposal as violative of the general prohibition against post "B" cut-off upgrading where it is definite and final on the exhibits exchange date- *or earlier* if specifically called for by the ALJ.

Id. (Emphasis added.)

50. Under the *Order Prior to Prehearing*, FCC 88M-066, released January 13, 1988, the parties were directed as follows:

> *Integration*
>
> On or before January 29, 1988, counsel for the applicants shall serve upon each other, Mass Media Bureau counsel and the Presiding Judge a full, complete and definitive statement of their integration proposal, - - -.

Id. at Para. 2(a). Thus, under the Commission's standard established in *Northland*, January 29, 1988, was the date on which RBC was required to have firmed-up its integration by subscription agreement, or stock issuance, or a promissory note that bears a due date evidencing an enforceable obligation to purchase the stock. *Compare Rayne Communications, Inc.*, 1 F.C.C. Rcd 1052, 1055 (Review Bd 1986) (Review Board rejects parole evidence of ownership arrangements where a sole proprietorship is not involved). It is recognized that in a similar case, the Review Board later affirmed a finding that there need be no written subscription agreement or issued stock certificate at the cut-off where other indicia of a firm commitment are present. *See Pacific Television, Ltd.*, 2 F.C.C. Rcd 1101 (Review Bd 1987). But that holding is distinguishable in two material respects. First, a document was filed at about the time the application was filed which "established that all stock would be issued to the three stockholders identified in the FCC application." *Id.* at 1104. In this case, there was no such corresponding document filed with the Secretary of State that referred to "shareholders."[8] Second, as indicated above, Byers was misleading in his testimony

about the nature and extent of his financial contribution (Para. 19, *supra)* and he relied on a note evidencing his indebtedness which set no time for repayment. Thus, the documents in this case are not the "functional equivalent" of subscription agreements for ownership purposes as was found in *Pacific Television, Ltd., supra*. The ultimate standard for crediting proferred integration is whether "an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out." *Bradley, Hand and Triplett*, 89 F.C.C. 2d 657, 662 (Review Bd 1982). Here, in view of the absence of a subscription agreement or an enforceable note, or a functionally equivalent written instruction or document relating to shareholders, RBC failed to provide a reasonable assurance before the stock certificates were issued on March 8, 1988, which was well past the integration exchange date. Thus, it is concluded that RBC has failed in its burden to prove that Byers was timely committed to RBC's integration proposal as a voting stockholder.

Simla Broadcasting

51. RBC argues that Simla's proposal should be rejected and that Simla should be accorded an integration credit of no more than 50% based on the evidence of Charles Ellis' active participation in and shared control over Simla's application. (RBC RPFC at 23-25.) As found above, all of the money used for expenses is taken from a joint checking account and most of the cash in that account was provided by Charles Ellis. He also prepared the engineering portion of the application, played a key role in a business plan and in estimating costs, negotiated directly with a site owner and drafted an option for the land, and actively participated in settlement negotiations beyond a mere advisory role. There has been no legal document prepared to divest Charles' community property interest in the station as was done in the case of other broadcast properties and there is past evidence of Charles Ellis' control exercised over the Maurice station just before it was sold by Simla.

52. These circumstances establish control by Charles Ellis over Simla's application and a likelihood that such control would continue after an award of the construction permit. *Compare Religious Broadcasting Network, et al.*, 3 F.C.C. Rcd 6216, 6217 (Review Bd 1988) (attorney's likely future roles in future affairs of applicant deemed relevant). Therefore, Simla will receive no integration credit for her proposal. *Washoe Shoshone Broadcasting, et al., supra* at 3955 (alleged "passive" investor dominated and controlled enterprise by dictating crucial terms of governing documents and no integration credit was awarded). *Compare N.E.O. Broadcasting Company, supra* at 1035 (non-owner husband was found to control 100% owner wife in all decisions regarding application and corporate structure and applicant was not credited with integration) and *Progressive Communications, Inc.*, 3 F.C.C. Rcd 5758, 5761-62 (Review Bd 1988) (where husband withdrew entirely from the venture but continued to participate in decision and influence wife, no integration was awarded). Also, in light of the circumstances of control relied on for concluding that Charles Ellis has control over the application, Simla has failed to show by a preponderance of the evidence that Simla Ellis alone controls the application. *See Steadman* v. *S. E. C., supra*.

Contingent Comparative Analysis and Conclusions

53. RBC is credited with 50% integration credit for the full-time participation in management by Ms. Lizotte. Simla Ellis receives no integration credit because of the control which her husband was found to exercise over her application. Therefore, RBC is the clear winner on quantitative findings and conclusions.[9] But in the event that the above findings and conclusions are reversed on appeal, a contingent comparative analysis will be made.

Diversification

54. Diversification of control over the means of mass media communication is a factor of primary significance and it constitutes a primary objective of the broadcast licensing scheme. *Policy Statement, supra* at 394. Neither party would receive a demerit for diversification. *See* Findings at Paras. 6 to 8 and Conclusions at Paras. 43 to 45, *supra*.

Local Residence And Civic Involvement

55. Lizotte has the longest residential contact with the service area (32 years) and she promises to move to Rayne. Byers has lived on the fringe of the service area for the past 6 years. Simla Ellis claims to have lived on the fringe of the service area for 10 years.[10] Byers and Ellis also promise to move to Rayne. The most significant civic experience has been accrued by Ms. Lizotte over her 32 years in the area. Byers and Ellis have lesser civic involvement with Byers having a considerable edge over Ellis. Therefore, RBC is contingently credited with a moderate to substantial local residence credit and a moderate to substantial civic involvement credit over Simla. These conclusions are consistent with the Commission's policy in recognizing residence of several years' duration as being much more significant than proposed future residence. *See Armando Garcia*, 3 F.C.C. Rcd 1065, 1068 (Review Bd 1988), and cases cited therein.

Broadcast Experience

56. RBC has combined broadcast experience of over 25 years. Ms. Lizotte's experience has been primarily in sales. Mr. Byers' experience has been primarily in marketing and sales. Such experience is qualifying and the total years credited to RBC's years exceed Simla's four years experience. It is noted that Simla's experience in broadcasting has been broader since she has constructed and operated station KFXZ in Maurice, Louisiana. However, the longer time of Lizotte and Byers in the industry qualifies RBC for a moderate preference over Simla based on broadcast experience.

Comparative Coverage

57. Each of the applicants will serve virtually the same size area. RBC will serve 8,310 more people than Simla, or slightly less than 10%. No applicant proposes to serve any white or gray areas. Simla seeks to provide a fifth service to 511 persons which is *de minimis* as a factor. The Commission has awarded slight preferences to applicants providing substantially greater overall coverage even where the additional area to be served is already well-served by five or more existing services. *Christian Broadcasting of Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984). But RBC will cover only 9.62% more persons than Simla and Simla will provide only 511

persons with a fifth service. Since all of the areas involved are already well-served, RBC should receive only a "very slight" preference over Simla for a superior population coverage proposal. *Resort Broadcasting Co., Inc.*, 41 F.C.C. 2d 640, 647 (Review Bd 1973) (no more than slight preference awarded where persons served already receive an abundance of radio service). That slight preference is awarded to RBC because population served is the most important criteria in evaluating comparative coverage of FM proposals. *WMID, Inc., et al.*, 12 F.C.C. 2d 837, 838-39 (Review Bd 1968).

Gender and Minority Preference

58. If Simla and Byers are each awarded 100% integration, each would receive a preference for Lizotte's and Simla's female gender, RBC would receive an additional credit for Byer's minority race, and Simla would also receive an equal preference for her minority race. Thus, neither applicant would receive a preference in favor of the other based on race or gender.

Auxiliary Power

59. Since both parties propose to install power equipment at their sites, neither RBC nor Simla achieves any qualitative advantage over the other for auxiliary power.

Contingent Comparative Summary

60. If RBC and Simla each qualify for 100% integration, RBC would achieve quality preferences over Simla for residence and civic involvement (moderate to substantial) and broadcast experience (moderate). Both applicants would have equal gender-minority preferences. Therefore, RBC would be the qualitative winner based on residence-civic involvement and experience. However, since RBC receives 50% integration and Simla is entitled to no quantitative integration credit, RBC will receive the construction permit without the need to consider qualitative merits and preferences.

ORDER

Accordingly, based on the foregoing, IT IS ORDERED that unless an appeal from this Decision is taken by a party, or unless the Commission reviews this Decision on its own motion,[11] the application of Simla B. Ellis d/b/a Simla (File No. BPH-861125MK), IS DENIED.

IT IS FURTHER ORDERED that the application of Rayne Broadcasting Company, Inc. (File No. BPH-861125ME) for a construction permit for a new FM station on Channel 294A at Rayne, Louisiana IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] The application of Benjamin Macwan was rejected in a ruling on reconsideration under the *Hearing Designation Order, supra* at Paras. 3, 10, *aff'd* by Comm'n *In re Benjamin Macwan*, FCC 89-176, released June 9, 1989, 4 F.C.C. Rcd 4769 (1989). Rayne FM, Ltd. was dismissed voluntarily on September 22, 1988, pursuant to an agreement with RBC (FCC 88M-3179). Cail Enterprises, Inc. was dismissed voluntarily on March 27, 1988 (FCC 88M-850). Southwest Louisiana Broadcasting Company, Inc. failed to enter an appearance and on March 9, 1988, was dismissed for default (FCC 88M-661). Cart Broadcasting Company, Inc. was dismissed on March 22, 1989 for default in failing to file proposed findings and conclusions (FCC 89M-945).

[2] RBC Exh. 5 is the Technical Statement of RBC's engineer consultant, Ronald D. Rackley. The evidence states Mr. Rackley's determinations of the geographic coordinates of Byers' claimed residence with his fiance on Caffery Boulevard and his former residence at 101 Wilbourn Boulevard in Lafeyette, Louisiana.

[3] The testimony also refers to Byers' participation in charity events sponsored by his employer, Station KJCB. (RBC Exh. 3.) But that evidence is equally probative of efforts to establish the station's good will and to gather news and news sources for public events broadcasting. It will not be counted as Byers' personal civic involvement. Also, the civic activities recited in Para. 27 is received over objection on the grounds that it was first disclosed in a later supplement to RBC's integration statement.

[4] Matters cited in Byers' sworn written testimony for which credit is not given are his participation as chairman in Station KJCB's Food for The Needy Program and KJCB's Easter Hunt for the Blind (1982-87). These activities are highly commendable but are closely related to his position as an employee of KJCB. Such evidence is equally probative of advancing KJCB's public service program to the community which that station serves. Ellis, Tr. 868.) Charles Ellis became involved in sales and broadcasting matters in addition to his engineering duties. (C. Ellis, Tr. 869-70.)

[6] If credit is given on review, contingent findings on civic activities are made as follows. She has been a member of two PTAs and she has participated in fundraising for both. (Simla Exh. 3.)

[7] Mike Basso alerted Lizotte to the Rayne allocation. He went with her to visit a site landowner with whom it was difficult to communicate. He also witnessed her signature to articles of incorporation. These are three discrete unrelated instances of fraternal assistance which are insufficient in their totality to ascribe influence or control to Mike Basso over his sister's business decisions.

[8] The documents include articles of incorporation and a report that were executed on October 14, 1986, and filed with the Secretary of State on November 17, 1986. (Cart Cross Exh. 1.) These documents disclosed Lizotte and Byers as original directors and officers, but there were no references to identifiable shareholders. RBC's Form 301 did specify Lizotte and Byers as owners of 50% each of the voting stock.

[9] There is no analysis needed under the Commission approved Hirschman-Herfindahl Index ("HHI") because the quantitative advantage found for RBC over Simla is intuitively self-evident. *Compare Omaha TV 15, Inc. et al.*, 4 F.C.C. Rcd 730, 65 Radio Reg. 2d (P&F) 1019, 1025 (Comm'n 1988) (wherein part time integration credit when analyzed on hourly basis *via* nonlinear analysis under Justice Department's HHI formula was adapted to FCC broadcast cases).

[10] Simla's contention on residence was rejected for failure of proof. *See* Para. 39 and n.6, *supra*. Therefore, it will only be considered now as a contingent finding.

[11] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-25

In the Matter of

Compulsory Copyright License
for Cable Retransmission

REPORT
(Proceeding Terminated)

Adopted: October 27, 1988; Released: August 3, 1989

By the Commission: Chairman Patrick issuing a separate statement; Commissioner Quello concurring in part and dissenting in part and issuing a statement; Commissioner Dennis concurring and issuing a statement at a later date.

Table of Contents

	Paragraphs
I. Introduction	1-17
II. Background: Adoption and Operation of the Compulsory License	18-64
Cable Retransmission of Broadcast Signals Up to 1976	19-33
The Compulsory License and the Copyright Royalty Tribunal	34-51
Marketplace Developments Since 1976	52-64
III. The Marketplace Today: Are Consumers Well Served by the Compulsory License?	65-115
Introduction	65-66
The Failure of the Compulsory License to Produce Market Prices	67-75
Full Copyright, the Compulsory License and Consumer Welfare	76-91
The Foreclosure Issue	92-105
Is Copyright Protection Too Generous?	106-115
IV. The Practicality of Full Copyright Liability	116-175
Introduction	116-118
The Compulsory License and Market Alternatives	119-145
Networking As A Mechanism for Marketing Cable Retransmission Rights	146-164
Transactions Costs Under the Copyright Royalty Tribunal	165-175
V. The Transition to Full Copyright Liability	176-186
VI. Summary and Conclusions	187-192
Appendix A: The Methodology of Royalty Calculations for Form 3 Systems	193-201
Appendix B: The Effect of the Compulsory License on Program Development Incentives: A Stylized Example	202-213
Appendix C: Statistics on Disbursements of Cable Royalty Funds	
Appendix D: List of Commenting Parties	

I. INTRODUCTION

1. On February 12, 1987, the FCC adopted the *Notice of Inquiry* in General Docket No. 87-25, 2 FCC Rcd. 2387 (1987), seeking information to help evaluate the comparative advantages and disadvantages of the compulsory license for cable retransmissions and to determine whether it or some alternative would better serve the public interest. We indicated that the record accumulated in this proceeding could serve as the basis for a legislative recommendation regarding the compulsory license. That record has allowed us to compare the compulsory license to full copyright liability. Drawing on our communications policy expertise, we have weighed the costs and benefits of each regime and have concluded that the compulsory license should be abolished. We hereby recommend that the Congress re-examine the compulsory license with a view toward replacing it with a regime of full copyright liability for retransmission of both distant and local broadcast signals.

2. Our inquiry and recommendations are firmly grounded in the Communications Act, the basic purpose of which is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[1] Furthermore, the Commission is directed to make "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable."[2] In 1984, Congress amended the Communications Act to add, for the first time, a title encompassing cable communications. A principal purpose of that title is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[3]

3. We are fully aware that Congress is the body with the authority and the responsibility for making copyright policy. Enforcement of copyright law is, of course, primarily the task of the judicial system. The expertise of the Federal Communications Commission is in the area of communications policy, not in the area of copyright. However, in the cable television area, communications policy and copyright issues have been intimately, perhaps inextricably intertwined from the start.[4] In essence, cable television has operated under a bifurcated system, with the Commission striving (via regulation and, later, deregulation) to structure a system capable of providing

the American public with a rich and diverse menu of video programming, one as closely matched as possible to viewer preferences and the Congress setting the property rights parameters within which the market for programming has operated.

4. Although a variety of services may be provided by cable, the bulk of cable service still consists of video programming. The quantity, quality, and diversity of that programming depends crucially on the terms under which it is acquired and distributed. Thus, it is appropriate for us to examine the process by which programming is provided to cable television systems, and to determine the impact on the public of disparate treatment of cable and other media, both old (*e.g.*, broadcasting) and new (*e.g.*, multichannel multipoint distribution service, direct broadcast satellite).[5] In the past, we have frequently confronted and considered questions of video program production and distribution. In connection with our regulation of television broadcast stations and networks, we have had occasion to analyze and, to a limited extent, regulate the production and distribution of such programming (*e.g.*, the financial interest and syndication rules, our 1980 network inquiry).[6] Moreover, from time to time, the Congress has called on the Commission's communications policy expertise for comment on matters of video program distribution. Our satellite signal scrambling inquiry is one recent example.[7]

5. The Copyright Act of 1976 was the first legislation that dealt explicitly with broadcasting and cable television retransmission of broadcast programming. It established that cable television systems are subject to copyright liability for the retransmission of broadcast signals.[8] The Act specified that liability in the form of a compulsory license for retransmission of broadcast signals, with compensation determined according to a statutory procedure.[9]

6. The legislative history of the Copyright Act of 1976, as embodied in the *House Report*, suggests that the primary reason for the choice of the compulsory license was Congress' judgment that the "transactions costs" (costs of negotiating licenses for cable retransmission) would be unacceptably high under full copyright liability.[10] Some observers suggest that Congress also acted out of concern that broadcasters might, in the absence of a compulsory license, withhold their programming from cable, thus depriving cable subscribers of access to broadcast signals that they were unable to receive over the air.

7. Our examination of the workings of the compulsory license system is focused on the current video environment and is designed to determine if the transactions costs of full liability are unacceptably high *today*, if there is a risk that cable subscribers could be foreclosed from access to broadcast programming *today*, and, most importantly, how would the range of programming available to the American viewer *today* be different under full copyright liability.

8. Our analysis suggests that American viewers would reap significant benefits from elimination of the compulsory license. As explained in some detail below, payments to copyright owners under the compulsory license almost certainly diverge from free market levels. This divergence harms viewers. Market rates, which are free to vary over time and across programs based on varying viewer preferences, provide an important flow of information regarding those preferences and furnish program producers with incentives to match their output closely to viewer demands. The compulsory license impedes this flow, to the detriment of the public interest in diverse and popular programming.

9. It appears that compulsory license rates are below market levels for some distant signals and above market levels for others, a situation that is possible because there is more than one rate category and the criteria for setting rate levels differ across categories.[11] Thus, full copyright liability could correct two types of distortion. In cases where the compulsory license rates are below market levels, full liability would bring higher rates and increased net revenues, providing increased rewards and incentives for the production of new programming. Such rate increases would change the relative price of, for example, distant broadcast signals and cable networks. In at least some instances, cable operators would delete distant signals and substitute cable networks for them. In cases where compulsory license rates are *above* market levels, full liability would likely lead to some additional cable carriage of distant signals.[12] This would yield new revenues to program producers.[13]

10. This discussion shows that the compulsory license hampers not only program production but program distribution as well. The artificial price structure created by the compulsory license distorts cable operators' choice between cable networks and distant broadcast signals. To the extent that compulsory license rates are below market rates, then cable operators' choices are inappropriately biased away from cable networks. In other words, the compulsory license may lead cable operators to offer a distant signal rather than a cable network that subscribers would prefer.

11. The compulsory license also distorts copyright holders' choice of distribution channel. Because of its wide coverage of local markets, broadcasting is a very efficient mode of distribution, particularly for programming with broad appeal. However, the compulsory license limits the ability of producers to control the geographic exposure of programming distributed via broadcast stations.[14] To the extent that alternative modes (*e.g.*, cable) are preferred solely because they allow more precise control of geographic exposure, the compulsory license reduces the efficiency of distribution. Concomitantly, in such situations, the return available to the producer is lower than it would be under full liability, and non-cable households are deprived of access to certain programming.

12. Thus, our examination suggests that, with full copyright liability, viewers would benefit from improvements in both program production and program distribution. Moreover, the existence today of literally dozens of cable networks that acquire rights to individual programs in the marketplace and package those rights for sale to cable operators suggests that, in the absence of the compulsory license, television stations would be able to acquire cable retransmission rights to "packages" of the programming that they broadcast. Cable operators could then negotiate with a single entity--the broadcast station--for carriage rights to each package. The cable network example provides convincing evidence that the transactions costs associated with full copyright liability are quite manageable. The "networking" mechanism that is so widely employed in other forms of video distribution appears well-suited to the acquisition of cable retransmission rights for broadcast signals too.

13. Under full copyright liability, individual broadcast stations could act as "retransmission rights packagers," analogous in some respects to cable or broadcast networks. Those stations that would acquire national cable retransmission rights would almost certainly be independent television stations, *e.g.*, WTBS or WGN.[15] At the local level, both independent stations and affiliates could act as retransmission rights packagers, acquiring *local* cable retransmission rights. In either case, the broadcast station would then market the retransmission rights that it had acquired to a group of cable systems, which would be analogous to "affiliates."

14. The viability of a full copyright liability regime is also supported by certain structural changes that have occurred in the cable industry since 1976, including the increasing size of multiple system operators and of individual cable systems. These developments have substantially reduced the transactions cost burden of full copyright liability on a per subscriber basis. On the other hand, ten years of experience with the compulsory license has demonstrated that there are significant transactions costs associated with *that* distribution mechanism.

15. Our evaluation of the compulsory license necessarily entails a comparison of the efficiency of program production and distribution with and without the compulsory license. This is an inherently difficult task, since it involves analysis of a hypothetical situation, but it is the only relevant comparison for public policy purposes. Thus, statistics regarding the health, profitability, or size of the program production industry or the broadcasting industry today are, in large part, irrelevant. Even if we were to find that these industries are "healthier" today than they ever have been, that would not support maintenance of the compulsory license.[16] The appropriate question is: "Would the consumer be better off without it?" Similar considerations apply to the assertions in the record that the cable industry is currently highly profitable. The issue is not cable industry profit levels but whether consumers would be better served, with respect to the range of programming available and the terms on which it is offered, by the compulsory license or by full copyright liability.

16. Our recommendation to eliminate the compulsory license is based on two conclusions.[17] First, under full copyright liability, consumers will benefit from a menu of programming, including new programming, that more closely matches their preferences and that is delivered by a more efficiently utilized group of delivery systems. Second, under full copyright liability, mechanisms will be available, with moderate transactions costs, to license programming to cable operators. Additionally, we believe that the arguments against the compulsory license and in favor of permitting producers to grant exclusive distribution rights to their programming have broad applicability.[18]

17. The remainder of this report is organized as follows. Section II provides background information on the development of cable signal carriage policy prior to 1976, passage of the compulsory license and its implementation by the CRT, and developments in the cable marketplace since 1976. Section III addresses the relationship between royalty rates under the compulsory license and those that would obtain under a full copyright liability regime, concluding that compulsory license rates generally diverge from what the market rates would be. It then compares the efficiency with which the program distribution system functions currently, and the range of programming available now, with the efficiency of program distribution and the program supply situation that would obtain in the absence of the compulsory license. The foreclosure issue is also considered in this section. In light of the improvements in program production and distribution that the analysis of Section III suggests would be associated with full copyright liability, Section IV examines the practicality of the alternative mechanisms that might be expected to arise in the absence of the compulsory license, considers the arguments of those who support retaining or merely modifying it, and summarizes available information on the transactions costs of the current system. Section V briefly considers the mechanics of the transition to full copyright liability. Section VI contains a summary and conclusions.[19]

II. BACKGROUND:
Adoption and Operation of the Compulsory License

18. This section begins with a summary of the status of cable retransmission of broadcast signals prior to the Copyright Act of 1976 and a description of the adoption of the compulsory license. This account reveals the Commission's longstanding involvement in matters of program supply to cable systems. Next it explains the operation of the compulsory license system, stressing the determination of the Copyright Royalty Tribunal to replicate, to the extent possible, a free market. The final subsection describes the development of cable television since 1976, emphasizing its growth as a provider of nonbroadcast programming (spurred by the use of satellite distribution) in addition to the retransmission of television broadcast signals.

Cable Retransmission of Broadcast Signals Up to 1976

19. *The FCC and Distant Signal Retransmission.* Communications policy and copyright issues have been inextricably intertwined since the beginning of Commission efforts to establish appropriate policy with respect to cable television regulation. Over the past 30 years, the Commission has examined a variety of approaches to the regulation of distant signal importation. These have ranged from "retransmission consent" (a form of full copyright liability) to a scheme under which the Commission would authorize limited distant signal importation, with *local* stations supplying commercials to be inserted into that programming, and Congress would adopt a compulsory license.

20. In 1959, the Commission adopted its *Report and Order* in Docket 12443, an inquiry into the impact of cable television systems and other "auxiliary services" on "the orderly development of television broadcasting.[20] At that time, the Commission found "no present basis for asserting jurisdiction or authority over CATV's, except as we already regulate them under part 15 of our rules with respect to their radiation of energy." The Commission did, however, indicate its intention to recommend that Congress adopt two amendments to the Communications Act.

21. The *Report and Order* points out that Section 325 of the Communications Act was adopted in an effort to protect property rights in television programs by requiring stations rebroadcasting the signals of other stations to obtain "rebroadcast consent." The Commission stated its intention to request that Congress amend this section to include cable retransmission, finding that it is "desirable

to clarify the situation with respect to property rights and also "desirable to place the CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations.[21] The other recommendation was for the Congress to require cable systems "to carry the signal of the local station if the local station so requests" (*i.e.*, must carry rules).[22]

22. By 1966, the Commission had asserted additional jurisdiction over cable television. The *Second Report and Order* in Docket No. 15971 dealt in part with the issue of "fair competition" between cable and broadcasting. It noted that cable systems were "outside of the . . . program distribution process," and could gain access to programming via distant broadcast signals without bargaining with or compensating the program supplier.[23] Citing the "anomalous conditions under with the broadcasting and the CATV industries compete," the Commission recommended that Congress consider applying the Section 325 retransmission consent provisions to cable television operators.[24]

23. In 1968, the Commission returned to "one of the fundamental policy questions in this area--the element of unfair competition."[25] The Commission proposed to adopt its own retransmission consent requirement.[26] In this connection, the Commission noted that

> We are not proceeding on some notion of unfair competition from the viewpoint of the Federal Trade Commission Act or the *Compco* or *Sears* cases. Nor are we concerned here with unfair competition from the aspect of the copyright owner. Rather, our concern is the public interest in the broadcast field--"the larger and more effective use of radio." That being the case, we must proceed to consider regulations to eliminate this aspect of unfair competition. (citations omitted)[27]

The Commission went on to point out that what appeared to be needed was a "meld of copyright, communications and antitrust policies," and that the Commission proposal, "while stemming from our responsibilities under the Communications Act necessarily also embodies considerations like copyright in its practical applications" (citations omitted).[28]

24. The Commission proposal was structured so as to allow some experimental operations under its provisions while the Rule Making proceeding was in progress. The results of the retransmission consent experiments reflected both the difficulties that cable systems faced in operating under essentially full copyright liability in that era as well as the fact that interested parties were undoubtedly trying to influence the Commission's deliberations and those of Congress, which was also actively reviewing cable television policy matters at that time.[29] The retransmission consent experiments were generally considered a failure,[30] and it was against this background that Congress began its serious consideration of compulsory licensing alternatives.

25. In 1970, the Commission put out for comment another proposal to deal with the "unfair competition" issue.[31] The Commission noted that the industry had shown little interest in the retransmission consent experiment and that the Commission was deferring further action on it while waiting for Congressional guidance in the copyright area. After explaining that the retransmission consent plan would protect UHF stations from "unfair competition," the Commission made a proposal designed to "affirmatively assist the elements of broadcasting most requiring aid--the independent UHF station and the public broadcasting system (ETV)," and to "do so in a way which can be fair to the copyright owner and will not undermine the healthy operation of all other stations in these markets."[32]

26. Under this plan, cable systems in the top 100 markets would be permitted to carry four distant independent signals, but would be required to delete commercials from those signals and replace them with commercials provided by local stations. The cable system would also be required to pay five percent of its subscription revenues to public broadcasting. In order to be fair to copyright holders, the Commission suggested that Congress could grant a compulsory license to cable systems for importation of these distant signals and set royalty rates for the cable systems to pay.[33] The Commission proposal included what was probably one of the first attempts to describe how rates under a compulsory license system might be set and how procedurally such a system might function.

27. The Commission terminated this and various other proceedings in 1972 when it adopted its *Cable Television Report and Order*,[34] comprising a new set of rules to govern cable television broadcast signal carriage. The new rules were adopted only after the Commission received the assurance of Senator McClellan, then-Chairman of the Senate subcommittee with responsibility for copyright legislation, that the new rules would facilitate pasage of legislation and with the pledge of the cable television, motion picture, and broadcast industries to support such legislation.[35]

28. The 1972 rules included, among other provisions, distant signal importation limits, syndicated exclusivity provisions, and must carry obligations with respect to local broadcast signals. The 1972 rules and all that went before testify to the bifurcated system that has long governed cable retransmission of broadcast signals: Commission regulation, guided by communications policy considerations of program diversity and the "larger and more effective use of radio," coupled with Congressional action to set the terms of copyright. With this background, we turn to a brief look at the application of copyright law by the courts to broadcast programming in the period prior to 1976 and at the adoption of the Copyright Reform Act of 1976.

29. *Broadcasting and Copyright Up to 1976.* Until the passage of the Copyright Reform Act of 1976, copyright legislation in the United States dealt primarily with the printed word and lacked specificity about much more than the number of years for which a copyright would run. Interpretations of what kinds of works were protected and what would trigger copyright liability were left to the courts; but the development of new communications technologies, including radio and television broadcasting, cable, and satellite transmission, made such interpretation increasingly difficult.

30. In particular, the Supreme Court, in a 1968 case involving local signals and a 1974 case involving distant signals, held that the definition of "performance" in the Copyright Act of 1909, then in effect, did not encompass cable retransmission.[36] As a consequence, the Court found that cable systems incurred no copyright liability whatsoever for retransmission of television broadcast signals. The Court recognized, however, that

> shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in the field, must be left to the Congress.[37]

Thus, the Court made no determination as to what would constitute appropriate copyright arrangements for cable retransmission of broadcast signals and encouraged the Congress to enact legislation dealing with such arrangements.

31. Congress was not unaware of the inadequacies of existing copyright law, not only with respect to cable television but also with respect to photocopying, computers, and other technological advances that were not contemplated in the 1909 law. With respect to cable television, bills were introduced in 1964 and 1965 that would have explicitly held cable fully liable for signal retransmission, although many in the Congress apparently believed that such liability was already implicit in the existing law.[38] Subsequent bills, culminating in the 1976 Act, began to move away from the principle of full copyright liability, however, and the cable compulsory license was included in section 111 of the Act as one of several exceptions to the general granting of exclusive rights in section 106 of the Act. The justification offered for substituting the compulsory license for full copyright liability was that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[39]

32. In the 1976 Act, as in its predecesor, Congress chose to rely heavily on market mechanisms to encourage and reward creative activity. The 1976 Act contains a general grant of "Exclusive rights in copyrighted works," conferring on the copyright owner the "exclusive rights to do and to authorize" various uses of the work, including "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly."[40]

33. For the first time, television broadcasting and the cable retransmission thereof are addressed. The 1976 Copyright Act provides that cable retransmission of broadcast signals *is* a "public performance" of audiovisual works and *is* subject to copyright liability.[41] Nevertheless, Congress limited the exclusive rights of copyright holders of audiovisual works by imposing a compulsory license for cable television retransmission of broadcast signals.[42]

The Compulsory License and the Copyright Royalty Tribunal

34. The compulsory license became effective on January 1, 1978. Under the compulsory license, cable systems make royalty payments every six months to the U.S. Register of Copyrights, an agency of the Library of Congress. The Register of Copyrights places the money in an escrow account and maintains the "Statement of Account" that each cable system files. The Copyright Royalty Tribunal (CRT), also created by the 1976 Act, is an independent agency charged with distributing the royalties to copyright claimants. It also has the task of adjusting the rates.

35. *Royalty Rates and Their Adjustment* The initial rates were set in the 1976 Act. The Act provides that the CRT may adjust the royalty rates in response to inflation and in the event of changes in certain FCC rules.

36. In order to maintain the "real constant dollar level of royalty fee per subscriber" that was in effect at the time the Act was adopted, the CRT is authorized to adjust rates to reflect changes in the general price level and changes in average basic cable subscription rates.[43] If basic cable rates rise faster than the price level, then no adjustments under this provision will be made. The statute specified that the CRT should initiate such a proceeding in 1980. Subsequent adjustments are to be made by the CRT in response to petitions from copyright owners or from users of their works who have a "significant interest" in the rates. Such petitions may be filed every five years, starting in 1985.

37. In addition to authorizing "inflation" adjustments, the statute also directs the CRT to revise the royalty rates if the Commission's distant signal, syndicated exclusivity, or sports exclusivity rules are changed from those in effect on April 15, 1976.[44] The Commission eliminated its distant signal limitation and syndicated exclusivity rules on July 22, 1980, and these actions became effective on June 25, 1981, after they were upheld on appeal.[45] These actions constrained the ability of copyright owners to control distribution of their product. As directed, the CRT then instituted new rates designed to compensate copyright holders for this disadvantage. These rates, which apply to Form 3 systems only, were adopted on October 20, 1982, and they took effect on March 15, 1983.[46] Those systems that carry more distant signals than were permitted by the FCC rules of June 24, 1981 pay the "3.75" or "Malrite" fee. Systems in the top 100 television markets also pay a "syndicated exclusivity" fee.[47]

38. Cable systems are classified by semiannual gross receipts into three groups, for the purpose of rate calculation.[48] Currently, after various adjustments, there is a group for which semiannual gross receipts are less than or equal to $75,800, a group for which those receipts are greater than $75,800 but less than or equal to $292,000, and a group for which those receipts are greater than $292,000. The systems in the three groups are called "Form 1," "Form 2," and "Form 3" systems (after the statement of account forms that they need to fill out). In fact, both Form 1 and Form 2 systems now use the same form.[49]

39. Form 1 systems currently pay a flat fee of $28.00 per six-month reporting period, while Form 2 systems pay according to a formula, based on the gross receipts figure, that yields a *maximum* payment per six-month reporting period of $2,190.[50] Form 1 and Form 2 systems incur their full liability under the compulsory license with the first broadcast signal that they retransmit. The incremental cost to such cable systems of additional broadcast signals, distant or local, is zero.

40. While all systems must report signal carriage, Form 3 systems are the only ones for which this information is used in calculating the royalty payments.[51] They are also the only ones that must report which signals carried are distant and which are local. In essence, the royalty payments are determined by the number and type of distant

signals carried by a Form 3 cable system. While these systems are required to make a payment "for the privilege of further transmitting any nonnetwork programming," even if they carry no distant signals, this fee may be applied against the system's distant signal liability. Cable systems that carry one or more "distant signal equivalents" in effect pay nothing for retransmitting local signals.[52]

41. Gross receipts are described in the Act as "the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters."[53] The Copyright Office, which is responsible for collecting the fees from cable operators and maintaining the statements of account, defined gross receipts as "the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals."[54]

42. That definition was challenged by Cablevision Systems Development Company, a cable television multiple system operator. In essence, Cablevision claimed that cable operators should be able to allocate their monthly basic service fees among broadcast and non-broadcast services and that only the share attributable to broadcast services should constitute "gross receipts." The effect of this would be to reduce significantly the royalty payments of cable operators. Cablevision won its case at the district court level, but the appeals court reversed and remanded it.[55] While the case was on appeal, the Copyright Office adopted the procedure of permitting cable operators to make their own gross receipts calculations and accepted contributions based on them. However, cable operators also were required to calculate and report what their contribution would be under the Copyright Office definition of gross receipts.[56]

43. *Royalty Distributions* Table 1 shows the amounts of money distributed by the CRT under the cable compulsory license. For 1978-84, all of the funds collected have been distributed. For 1985, virtually all funds have been distributed. The 1986 distribution is incomplete. Since 1983, the fund has been made up of three components. Based on the most recent (1985) distribution, the basic fund accounts for roughly 60 percent of the total and the "3.75" and syndicated exclusivity funds account for roughly 20 percent each.

44. The CRT uses the following procedure to distribute the royalties to copyright claimants.[57] Each July, all who claim to be entitled to a share of the royalties must file a claim with the CRT. The Act provides claimants with an exemption from the antitrust laws so that any group of claimants may "agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." If the CRT finds that no controversy exists regarding the distribution, it then disburses the funds, after deducting its own "reasonable administrative costs under this section." (*See* table 3 in appendix C). If a controversy does exist, then the CRT conducts a proceeding to determine how the royalties should be distributed. During the pendency of such proceedings, the CRT may distribute amounts that are not in controversy, but it is required always to hold back funds sufficient to satisfy all claims over which a controversy exists.

Table 1

Cable Television Royalty Fund Distributions

Year	Total Size of Fund
1978	$ 17,717,000
1979	23,732,000
1980	28,052,000
1981	35,559,000
1982	44,375,000
1983	84,317,000[a]
1984	100,465,000[a]
1985	113,264,000[a]
1986	119,025,507[a,b]
1987	155,454,004[a,b]
1988	91,810,554[b,c]

Sources: For 1978-85 collections and distributions and 1986 distributions: *Annual Report of the Copyright Royalty Tribunal for the Fiscal Year Ending September 30, 1987* (*1987 Annual Report of the CRT);* CRT "Summary Fact Sheet" January 1988; CRT Files. For 1986-88 fees paid: U.S. Copyright Office.

Notes: 100 percent of the fund has been distributed for 1978-84; 99.55 percent has been distributed for 1985. For 1986, $62,869,000 has been distributed. No distributions have been made for 1987 and 1988.

a For these years, the total fund includes basic, 3.75, and syndicated exclusivity fund segments. The percentage composition of the total for 1983-85 is

	1983	1984	1985
Basic Fund	61.6%	57.1%	59.5%
3.75 Fund	16.7	22.3	20.4
Syndicated Exclusivity Fund	21.7	20.6	20.1

b These figures represent total collections, not including accrued interest

c Collections for first six-month accounting period only.

45. CRT royalty distribution proceedings are conducted in two parts.[58] In "Phase I," the CRT allocates cable royalties among categories of program. A division among individual claimants within program categories is made, where necessary, in "Phase II." In 1978, there were six Phase I copyright owner groups. They were: Program Suppliers, Sports, Public Broadcasting Service (PBS), Music, US and Canadian TV, and National Public Radio (NPR). NPR received no allocation in 1978, but has received something in all subsequent distributions. In 1979, the television claimants split into two groups--Commercial TV (represented by the National Association of Broadcasters) and Canadian TV. In 1980, a separate category of "Devotional Claimants," producers of certain religious programming, was added. These eight groups have been the Phase I participants in all subsequent distribution proceedings. These groups were able to reach settlement agreements without CRT litigation in 1981, 1984, and 1985.

46. There has been a Phase II controversy every year (the years for which the distribution is complete are 1978-85). In 1978 and 1985, there were controversies in the Music category, while in 1982 there was also a controversy in the Sports category. In the program suppliers category, there have been controversies in every year except 1978. Virtually all of the program suppliers have chosen to be represented by the Motion Picture Association of America (MPAA), but a few have not. In 1985, the only other claimant in this category was Multimedia. In some of the earlier years, the National Association of Broadcasters (NAB), the Spanish International Network, certain religious programmers, and Mutual of Omaha had submitted separate claims (not all of these submitted separate claims each year).

47. Although there have been controversies almost every year, it is nevertheless true that the private process of consolidating claims has simplified the distribution. In 1985, for example, 696 individual or joint claims were filed, but they were consolidated into eight groups.[59] This simplification (compared to a more detailed administrative allocation procedure) is, of course, welcome. However, it should not be confused with improved efficiency in a market sense. The divergence between compulsory license rates and market compensation levels may be little affected by the claim consolidation process.[60]

48. The CRT formulated its royalty allocation principles in its first (1978) distribution proceeding. The key criteria were described in the following manner.

> The Tribunal determined the primary factors to be:
>
> (a) the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems,
>
> (b) the benefit derived by cable systems from the secondary transmission of certain copyrighted works, and
>
> (c) the marketplace value of the works transmitted.[61]

The first factor can be interpreted as the minimum amount that copyright owners would have to be paid in order to induce them to allow cable retransmission of their programming. The second factor can be interpreted as the maximum amount that cable operators would be willing to pay in order to retransmit the copyrighted works. In other words, these are the upper and lower bounds on the "marketplace value" of those works. The Court of Appeals decision upholding the CRT's 1978 distribution and its methodology notes in passing that the CRT endorsed the proposition that these two factors "involve a marketplace-type inquiry."[62] In essence, then, all three primary factors involve an attempt to replicate a market result.

49. After enumerating the factors it would consider in allocating royalty funds, the CRT expanded as follows on its distribution methodology:

> The Tribunal concluded that the allocation must take primary account of market factors in an effort to *simulate market valuation*. It is our opinion that the compulsory license was established by Congress to compensate for a perceived deficiency in the unregulated market . . . The evidence in this proceeding indicates that the usefulness and application of the compulsory license is limited to the market inadequacy which justifies its existence. Congress and the courts have recognized that, in our economic system, *resources are most fairly and efficiently allocated by a market system*. The Tribunal decided that it was not the legislative intent of the Act to alter market valuation and return . . . Thus by assigning the relative weight to marketplace value, we determined not to impair the free play of market forces, subject to the limitation necessarily imposed by Section 111.[63] (emphasis added)

Thus, by its own declaration, the CRT has set as its goal the replication of a market outcome to the extent possible.

50. The 1978 proceeding took place when all compulsory license payments were made pursuant to the basic rates. As noted above, these rates were initially set by statute, and adjustments in them are limited to compenation for inflation. Hence, basic rates cannot be adjusted to replicate market levels. Indeed, when the CRT added the distant signal and syndicated exclusivity fees, it provided the following assessment of the statutory basic royalty rates.

> The Tribunal judged that the current statutory rates could not be considered those that would result from full marketplace conditions if the compulsory license did not exist. The rates were established as a legislative compromise, they are arbitrary, and they were intended to require only a minimum payment on the part of cable operators. The insistence by the cable operators on retaining the compulsory license is, in the Tribunal's judgment, an indication that *its cost to them is lower than what they would have to pay in the free market*. (emphasis added)[64]

Basic royalty rates still account for 60 percent of total compulsory license royalty collections. Thus, the statutory limitation on the CRT's ability to "simulate market valuation," appears to remain significant.

51. The proceeding to adjust the royalty rates to compensate for the repeal of the Commission's distant signal importation limits and syndicated exclusivity rules also suggests that the CRT has endeavored to simulate market results whenever it has had the opportunity to do so. When it established new rates in this proceeding, the CRT decision described its Congressional mandate as to "assure that such rates are reasonable in light of the changes to such rules and regulations."[65] The CRT explained its method of determining the new distant signal rates in the following fashion.

> In the absence of a free market or any marketplace directly analogous to that for distant signals, the Tribunal looked for its initial guidance to the marketplace analogies presented by the copyright owners and to the value for their programming that they derived from them. Then, on the basis of its judgment and the record as a whole, the Tribunal made a downward adjustment for what it considers

the difference between these marketplaces and the marketplace for distant signals. The Tribunal concluded that a fair and reasonable rate for each additional distant signal is 3.75%.[66]

The Court of Appeals has upheld both the CRT's methodology and its results.[67]

Marketplace Developments Since 1976

52. In recent years, cable television has evolved in its content and expanded massively in the scope of its distribution system. In addition, the number of households with home satellite dish antennas has increased significantly over the past five years. These changes are examined in this subsection, along with relevant FCC rule changes in this period, and the implications of structural changes in the cable industry for transactions costs.

53. *Evolution of the Cable Industry*. The period since 1976 has brought enormous changes to the cable television industry. In 1976, cable television was primarily a retransmission medium for broadcast signals. Today, it is an active participant in the program distribution marketplace, supporting dozens of full copyright nonbroadcast cable networks. One recent compilation lists 47 basic cable services (of which six are satellite-delivered broadcast signals), eight pay services, five pay-per-view services, and 14 sports services (mostly regional).[68] The total is 74 services (68 without the broadcast signals). An alternative compilation includes 50 national satellite-delivered basic services (of which four are broadcast signals), 10 national satellite-delivered pay services, and six non-satellite-delivered national services, as well as 15 regional basic services (one of which is a broadcast signal) and nine regional pay services (mostly sports).[69] The total is 81 (76 net of the broadcast signals). A 1987 listing prepared by the MPAA includes 84 services: 49 national basic services, nine national premium services, four national pay-per-view services, and 22 regional services (pay and basic).[70] Not included in these figures are 17 satellite-delivered "superstations" (seven independents and 10 network affiliates). By contrast, in 1976 there was *one* national cable network--Home Box Office. It had begun satellite distribution in 1975. There was also one superstation--WTBS in Atlanta--which began satellite distribution in December of 1976.[71]

54. The proliferation of readily-available cable networks has reduced the relative importance of broadcast signals, distant ones in particular, as a source of programming for cable systems. Available data show that the average "Form 3" cable system carried 3.381 distant signals in July of 1986. The comparable figure for July of 1980 is 3.768.[72] These data are based on the statements of account that cable systems file with the U.S. Copyright Office as part of the compulsory license procedure. Thus, 1976 figures are not available. However, since the Commission's distant signal importation rules were still in effect in 1980, the 1976 average is unlikely to be much higher than that for 1980, and could indeed be lower. When the Commission eliminated the distant signal rules, effective in 1981, many cable systems took advantage of it to add new distant signals. The decline in the average from 1980 to 1986 masks the fact that many systems added such signals.[73]

55. The cornucopia of cable programming has been made possible by a substantial growth in cable distribution capacity. This growth has, of course, involved substantial investment by the industry in cable facilities, but it has also been assisted by technical and regulatory advances that have significantly reduced the cost of satellite distribution.[74] The availability of low-cost national distribution facilities via satellite has made entry into the cable network business much easier and made it possible for relatively small scale entrants to survive.[75]

56. The scope and capacity of cable television systems have also increased markedly over the last 12 years. In 1976, only 17 percent of television households were cable subscribers, while 30.9 percent of television households were passed by cable.[76] Currently 53.8 percent of television households subscribe to cable, and 81.7 percent are passed by cable.[77] Moreover, today cable systems offer substantially increased channel capacity. In 1976, only 12 percent of cable systems offered over 20 channels, while in 1987 65.5 percent of systems offered 20 or more channels. In 1976, 76.3 percent of systems offered 12 or fewer channels, while the comparable 1987 figure is 20.5 percent.[78] In 1987, a full 91 percent of cable subscribers had access to 20 or more channels, while 77 percent had access to 30 channels or more.[79] The cable distribution system has thus expanded significantly and can now support a large menu of nonbroadcast programming.

57. Moreover, the growing number of households (now roughly two million) with home satellite dish antennas makes satellite distribution even more efficient and attractive for programmers.[80] Congress has recently extended the compulsory license to cover retransmission of broadcast signals by satellite carriers for private home viewing.[81] This compulsory license will remain in effect until December 31, 1994. In the case of stations affiliated with the three major commercial networks, the license applies only to unserved households (*i.e.*, those that are without off-air access to network affiliates and have not been cable subscribers for 90 days prior to their subscription to a satellite carrier's service).[82]

58. *Changes in FCC Rules*. As noted in the previous subsection, the Commission eliminated its distant signal and syndicated exclusivity rules in 1981. As a result, more distant broadcast signals are available to cable systems now than were available in 1976. In 1988, the Commission reimposed syndicated exclusivity rules. The new syndicated exclusivity rules are broader in scope than the earlier version. The new rules have not yet taken effect, so their impact cannot be gauged precisely. The rules could reduce the attractiveness of some distant signals to cable operators, although the managers of some prominent superstations have indicated that they will make adjustments to maintain their cable carriage.[83] In any event, distant signal availability is likely to remain above 1976 levels.

59. In 1977, the Commission's "anti-siphoning" rules were struck down by the court of appeals.[84] These rules had placed stringent limits on the ability of cable systems to acquire programming such as sports events and feature films for exhibition on pay channels. The elimination of these rules fostered the development of pay channels, thus increasing the array of non-broadcast programming available to cable subscribers.

60. Cable operators gained additional programming flexibility in 1985 when the courts struck down the Commission's must carry rules.[85] A Commission attempt to revise the rules to meet the court's concern over their constitutionality was unsuccessful.[86] Currently, then, cable operators have no local carriage obligations but are en-

titled to carry whatever local stations they choose. However, the royalty system is structured such that, once a cable system carries a single broadcast signal, distant *or* local, it may carry all other local signals without paying any additional fee. In practice, then, local signals are available to cable systems virtually without payment.[87] In general, FCC rule changes since 1976 have increased the program options available to cable operators, although the new syndicated exclusivity rules do impose some limitation.

61. *Changes in Cable Industry Structure*. Due to the increased incidence of multiple system ownership in the cable industry, the relative importance of transactions costs has fallen since 1976. There are undoubtedly some fixed costs of setting up a copyright rights negotiation operation at a cable system. Leaving aside the fact that cable systems already must do some work of this nature to secure rights to *cable* networks, it is likely that, for a cable system, the transactions costs are a function of the number of transactions and the number of transactors. We argue *infra* that, under full copyright liability, cable operators are likely to negotiate with broadcast stations (local and distant) for retransmission rights that those stations have acquired from program owners. Hence, the transactions costs facing a cable system are likely to be related to the number of broadcast signals it carries. Because the cost of negotiating carriage rights does not vary significantly with respect to the number of subscribers on whose behalf the negotiation is taking place,[88] the burden of a particular absolute amount of transactions costs is also related to the size of the negotiating unit--MSO or individual cable system. In particular, the burden will be lower when transactions costs are spread over a larger number of subscribers.

62. Data are available on the average number of *distant* broadcast signals carried by cable systems. The figures suggest that this average has remained virtually constant over the relevant period.[89] No data are available on the average number of broadcast signals carried per cable system. A very crude indicator of changes in local signal carriage may be constructed by calculating the percentage increase in the number of television stations on the air from 1976 to the present. For commercial stations, the figure is 50.2 percent; for all television stations, it is 44.6 percent.[90] These increases, while substantial, are significantly smaller than the increases in subscribership accounted for by MSOs and large individual cable systems.[91]

63. From 1976 to the present, there has been a tremendous increase in the number and share of cable subscribers served by MSOs and large individual cable systems. In 1976, the top 50 MSOs accounted for 7.4 million subscribers (68.7 percent of the total). In 1987, the top 50 MSOs accounted for 34.9 million subscribers (83.1 percent of the total).[92] In other words, the 50 largest negotiating units accounted for 4.7 times as many subscribers in 1987 as in 1976. Furthermore, according to NTIA, small cable systems are quite likely to be part of MSOs.[93] It is true, nevertheless, that a number of cable systems, albeit with a very small share of total subscribers, are not affiliated with MSOs.

64. Another dimension of size is also worth considering. The number and size of very large individual cable systems have also been increasing significantly. *Television Factbook* provides information on cable systems with over 20,000 subscribers.[94] In 1976, there were 68 such systems, with an average of 32,143 subscribers each. In total, 20.2 percent of cable subscribers were affiliated with "large" cable systems. In 1987, by contrast, 464 systems had more than 20,000 subscribers each. The average number of subscribers was 46,536, and *54.4 percent* of cable subscribers were affiliated with these "large" systems. Thus, even if some copyright license negotiations need to be conducted on an individual system basis (*i.e.*, those for retransmission of local broadcast signals), the majority of cable subscribers are now in big systems, so those fixed costs can be spread over a larger subscriber and total revenue base than was the case in 1976.

III. The Marketplace Today: Are Consumers Well Served by the Compulsory License?

A. *Introduction*

65. The previous section has documented how different today's television marketplace is from the one that existed in 1976 when the cable compulsory license was incorporated into U.S. copyright law as an exception to the general principle of relying heavily on market mechanisms to encourage and reward creative activities. In this section we examine whether such an exception continues to be warranted in today's marketplace. Our discussion focuses on the inherent difficulties an administrative agency like the CRT faces in trying to establish market rates and on the costs to consumers of having compulsory license rates diverge from market rates.

66. As described previously, cable systems that transmit distant broadcast signals are required to pay royalty rates that are a function of the size of the cable system and the number of distant signals the system carries. These royalties are then distributed to program suppliers by the Copyright Royalty Tribunal. In a market system, in contrast, program suppliers would be free to determine how they would distribute and charge for their programs and cable systems would have full copyright liability for all programs carried on distant signals they retransmitted.[95] If compulsory license rates exactly matched market rates, and if decisions about how programs are supplied and distributed were the same under either system, the choice between marketplace negotiations and the compulsory license could be resolved on the basis of which system had the smaller transactions costs. In fact, however, there are many reasons to believe that compulsory license rates do not match market rates for programs carried on distant signals and that, as a result, consumers do not get so rich and diverse a mix of programming under the compulsory license as they would get under full copyright.[96]

B. *The Failure of the Compulsory License to Produce Market Prices*

67. The compulsory license substitutes an administratively-set fee for a market price, and there is no link between the value of any particular program to the cable operator and the compulsory license fee he pays. Although it is theoretically possible that the compulsory license fees paid by cable systems are exactly equal to the value of the programs they receive and that the payments distributed by the CRT to program suppliers are in exact proportion to the values of the particular programs supplied by particular suppliers, such a result is highly improbable.

68. In an Appendix to MPAA's comments, economist Stanley Besen suggests three reasons why the result described is unlikely to occur:

> First, the administrative process by which fees must be established will generally lack the information required to set the level of fees appropriately. Moreover, the way in which the compulsory license fees were initially established for cable was based principally on an assessment of how much cable systems could "afford" to pay rather than on a determination of the economically efficient fee.
>
> Second, the CRT lacks the information and ability to distribute the fees collected according to the value of individual programs.
>
> Finally, a fee established by an administrative body is difficult and costly to change and will therefore be unresponsive to changing economic circumstances.[97]

69. The compulsory license fails to achieve market prices in three areas. First, compulsory license royalty rates are based on the size of cable systems and on the number of signals carried, not on the value of particular programs carried on particular signals; yet it is the latter information, which would be embodied in market prices, that conveys valuable information to program suppliers and distributors about what kinds of programs viewers most want to see. Second, in most cases, and on balance, logic and evidence suggest that the compulsory license rates paid by cable systems and hence the distributions made by the CRT to program suppliers, are below market prices. As a result, program suppliers as a group have less incentive to supply programs valued by consumers than they would have if they received full market value for their works. Third, steps taken by the CRT to consolidate claims, however valuable they may be in simplifying the administration of compulsory license royalty distributions, inevitably reduce the targeting of compulsory license fees to individual producers based on the value of their individual programs to consumers, whereas market prices would be negotiated between program suppliers (or their agents) and cable systems (or their agents) on the basis of individual program values.

70. ABC asserts that this first failure is inherent in the way compulsory license fees are set, commenting that

> [A] fixed . . . price necessarily harms program owners and viewers. The effect can be most easily illustrated by imagining the impact on the delivery of nonbroadcast cable service if all such services--from HBO to the Weather Channel--were required by the government to be sold at the same price. Even if the price fixed were a fair estimate of the "average" value of the various program services, it would send incorrect signals about every one of them, precisely because it is an average.[98]

The logical case for the proposition that compulsory license rates are generally below market rates was made by the CRT, citing the cable operators' insistence on maintaining it.[99] The comments in this proceeding adhere to the same logic. Program producers, who must sell their product at the statutory rates, oppose the compulsory license. Cable operators, who are permitted to purchase product at these rates, support it.

71. The empirical evidence that compulsory license rates are below market prices is strongest for Form 1 and Form 2 systems, which serve about 20 percent of all cable households.[100] These systems incur their full copyright liability with the first broadcast signal they carry, whether it is local or distant. All subsequent broadcast signals may be transmitted at no additional charge. It is logically possible that some Form 1 systems would pay the compulsory license fee to carry a distant signal but would not pay it to carry a local signal; it is also logically possible that some of a Form 2 system's royalty is based on gross receipts that it would not earn if it did not carry any distant signals; but as a practical matter, distant signals are free to most of these systems. Thus, for all intents and purposes, cable systems serving 20 percent of cable subscribers pay nothing at all for the valuable programs they acquire through distant signal retransmission.

72. Royalties paid by Form 3 systems do increase with the number of distant signals carried and with gross receipts from distant signal carriage, but the limited evidence available evidence suggests that average royalty rates are below market rates for these systems as well. Major League Baseball (MLB) provides data indicating that when it was receiving 0.5 cents per subscriber per game under full copyright from the USA cable network it was receiving only 0.07 cents per subscriber per game (seven times less) from games exhibited via distant signal.[101] Another illustration of the divergence between cable compulsory license rates and market rates is provided by the Association of Independent Television Stations (INTV), which quotes from a filing of TVX Broadcast Group, Inc. regarding its Norfolk, Virginia independent station. That filing asserts that "the average cost per half-hour of duplicated syndicated programming" for that station was $583.82, while "all cable systems in the Norfolk market carrying "superstation" WTBS Atlanta paid a combined copyright royalty fee of $15.41 per half-hour, or 38 times less."[102]

73. MPAA commissions a special viewing survey each year for use in CRT distribution proceedings. The latest available one, for 1985, reveals that 752,000 quarter hours of non-network programming were supplied to cable systems via distant broadcast signals.[103] With a total royalty fund of $113 million in 1985, this is equivalent to roughly $150 per quarter hour paid by cable systems as a whole to program suppliers as a whole. Although it is impossible to know for certain what this programming would have commanded in free-market negotiations, the examples offered by MLB and TVX suggest that the market value might be several multiples of the $150 per quarter hour collected through the compulsory license process. Proponents of the compulsory license have not offered any information that would refute this observation.

74. Although cable compulsory license rates are generally below market prices, there are some circumstances in which the compulsory license fee exceeds the market value of a signal, in which case the cable system will choose not to carry the signal because the value of the signal is less than the cost of acquiring it. After the FCC rules limiting the number of distant signals a cable system could carry were eliminated in June 1981 (along with syndicated exclusivity rules), many cable systems added

distant signals at the compulsory license fees then in effect. Pursuant to the Copyright Act of 1976, however, the CRT instituted a proceeding to adjust the compulsory license royalty rates to take account of the elimination of distant signal limitations and syndicated exclusivity. The rates that went into effect in March 1983 were higher for "nonpermitted" signals, *i.e.*, signals in excess of the number permitted under the prior rules, than they were for "permitted" signals. This increase in the rate for nonpermitted signals (3.75 percent of the relevant gross revenue for each signal) led to cable systems' dropping a substantial number of signals that they had added at the old rate during the previous two years.[104] The obvious implication is that the market value of these signals lay somewhere between the old rate and the new, but that at the new rate is was uneconomical to continue to carry those signals.

75. Although it might be possible for the CRT to refine its estimates of the market value of distant signals and bring the average fees collected more nearly in line with the average value of programs, statutory limits on basic rates interfere even with that goal. Worse, there appears to be no satisfactory administrative solution to the problem of closely approximating market prices for individual programs, either in the fees charged cable systems or in the distributions made to producers. Administratively-set prices are a poor substitute for market prices when the goal is to provide incentives to suppliers to meet consumer demands. We wish to emphasize that these conclusions do not constitute criticism of the way the CRT has carried out its duties. It is inherently impossible for any administrative agency, even one with substantially more funding than the CRT has, to gather and process in a timely manner the vast amounts of information needed to replicate market prices.

C. *Full Copyright, The Compulsory License and Consumer Welfare*

76. However dependent the cable industry may have been on distant signals in 1976, today cable is a healthy industry, well accustomed to negotiating in the marketplace for the rights to show programs. Therefore, we question the claims of those commenters in this proceeding opposed to replacing the compulsory license with full copyright liability that the result would be to deprive cable viewers of programs they want and to subject them to blackouts or other reductions in program availability. Rather, we conclude that television viewers generally, including cable viewers, will have enhanced program choices and a richer and more diverse video marketplace if our recommendation to replace the compulsory license with full copyright liability is adopted.

77. Our fundamental argument is that the cable compulsory license has weakened incentives to supply new programs compared to what they would be under full copyright liability at the same time the expansion of cable and other alternatives to traditional broadcasting have increased the demand for new programs. Thus, the gap between the potentiality to deliver programs and the programs actually being delivered is widening. Moreover, the cable compulsory license has distorted incentives to supply programs to the appropriate distribution outlet and hampered the development of an efficient complement of program exhibitors compared to the development that would take place under full copyright liability.

78. This distinction between what is and what could be is overlooked by those defenders of the compulsory license who argue that programming choices have expanded greatly during the past several years and that program suppliers and broadcasters are flourishing.[105] Moreover, it is an impossible standard of proof to ask those who argue that there is a gap between what is and what could be to enumerate the programs that are not being produced but that would be produced under full copyright. We do believe, however, that there is a compelling logic to the argument that the compulsory license has an adverse effect on program supply and distribution compared to full copyright and that there is good evidence to support this logic.

79. The primary justification for the cable compulsory license was the assertion that it would be prohibitively expensive for every cable operator to negotiate with the producer of every program carried on a distant broadcast signal the cable operator was proposing to retransmit. Nevertheless, the market has proved to be a remarkable mechanism for economizing on transactions costs and efficiently conveying information back and forth between consumers and producers so as to match consumers' demands with producers' ability to satisfy those demands. It is impossible to know for certain, however, exactly how the market will solve any particular coordination problem without actually letting the market develop. Nevertheless, we shall suggest in this report some of the ways that market negotiations in a full copyright regime could replace the cable compulsory license.

80. The clearest statement of the economic case against the compulsory license that appears in the comments submitted in this proceeding is the *Besen Statement*.[106] Besen identifies three major areas in which the existence of the compulsory license rather than full copyright hurts the viewing public:

> First, the compulsory license reduces the payments to suppliers of programs to broadcast television below the levels that they would obtain in free market transactions and thus reduces the volume of resources that is devoted to the production of such programs. This, in turn, reduces the quality of programs available to the viewing public.
>
> Second, the compulsory license creates an advantage for cable television operators over local broadcast stations and other competitive distributors of television programs, such as direct broadcast via satellites, that must negotiate for all of their programs in a free market. This leads to an inefficient mix of the way in which television programs are distributed to the viewing public.
>
> Finally, the compulsory license, by reducing the prices of retransmitted signals below their values in a free market, disadvantages cable-only networks which must compete with retransmitted broadcast signals for channel space on cable systems. The result is to reduce the resources available to these services and thus to lower the quality of programming available to viewers.[107]

Although our discussion will not be confined to the points raised by Besen, we find his arguments a useful starting point for discussing the failure of the compulsory license with respect to a) incentives to supply programs and b) incentives to distribute programs efficiently.

81. The argument that the compulsory license reduces incentives to develop new programs below what they would be under full copyright begins with the observation that program producers respond to economic incentives and that the amount of resources devoted to program development will be a direct function of the revenues producers can expect to earn by supplying programs. Full copyright liability for cable retransmission of distant signals offers market participants the widest possible scope to find the least-cost way of making programming available, whereas the absence of any copyright liability opens the possibility that producers will receive perverse price signals. Unfortunately, the compulsory license is more like a no-copyright regime than it is like a full-copyright regime. The best that can be hoped for from the compulsory license process is that it will approximate what can be accomplished more effectively through market negotiations. In most cases, however, producers' revenues will be lower under the compulsory license than they would be under full copyright liability. Producers' incentives to invest in creating new programs are correspondingly reduced. Hence, fewer resources are devoted to program development now than would be devoted to program development if the cable compulsory license were replaced by full copyright liability.[108]

82. Turning from the impact of the compulsory license on the overall supply of programs to its impact on what kinds of programs are developed and how they are distributed among exhibition media, we begin by noting that differences in the amount of resources devoted to developing particular kinds of programs aimed at particular markets will be a direct function of differences in the revenues producers can expect to earn in these different markets. In order for the market to function well in matching consumers' preferences for programs with producers' ability to supply programs, the intensity of viewers' preferences for different kinds of programs have to be reflected in the revenues producers earn. Full copyright liability provides the necessary link between viewers' preferences and producers' revenues, but the cable compulsory license does not.

83. Several areas in which the cable compulsory license distorts incentives from what they would be under full copyright can be identified.[109] First, program suppliers have an increased incentive to supply programs exclusively to cable. Second, cable systems have an incentive to carry distant signals rather than original programming, which, although more costly to acquire, may also be more highly valued by consumers. Third, cable systems can acquire programming on more favorable terms than other alternatives to broadcasters. Finally, the compulsory license introduces inefficiencies into the advertising market by creating mismatches between viewers and advertisers.

84. Consider first the impact of the compulsory license on non-cable households. We noted earlier that when the compulsory license process fails to reimburse program suppliers fully for the value of their program to viewers, the quality of programming that will be made available will be worse than it would be under full copyright. Thus, the quality of the general fare available to broadcast viewers will be lower under the compulsory license than under full copyright liability. Cable viewers will see some of this loss offset by the expanded viewing opportunities afforded by cable, but non-cable households will be clear losers.

85. Nor are cable viewers necessarily well-served by the compulsory license when it fails to duplicate the outcomes that would be achieved through market negotiations. Many commenters opposed to substituting full copyright for the compulsory license argue as though the costs of market negotiation would be prohibitive and that cable systems would have no alternative but to drop distant signals altogether if it were not for the compulsory license. Implicit in many of these comments is the expectation that this would leave substantial holes in the cable operators' lineup of programs, thereby reducing cable viewers' choices compared to what they are currently. We doubt transactions costs are prohibitive; but even in circumstances where a cable operator might decide that it is too expensive to negotiate to carry a particular program or entire distant signal, it would almost always be in the interest of a cable operator to substitute alternative programming for the dropped programming rather than show a blank screen.[110]

86. As Besen observes, "[A] calculation [of the costs of moving to full copyright] that ignores the fact that cable systems will attempt to replace imported distant signals with other programs will overstate, perhaps by a substantial amount, the effect of eliminating the compulsory license on the value of the service that cable systems can provide to their viewers."[111] Indeed, in some cases, cable operators confronted by market prices will be induced to substitute cable-only programming that cable subscribers value more highly than the dropped distant signal.

87. Suppose, for example, a distant signal has a value of 250 to consumers, generates revenue of 200 to the cable operator, but carries a compulsory license fee of only 100, whereas an alternative cable-only programming source (competing for space on a limited-channel system) has a market value of 325 to consumers, would generate revenues of 250 for the cable operator, and has a cost to the cable operator of 180. Suppose further that the full-copyright market price of the distant signal would be 150. The cable-only channel is more valuable to consumers, but a profit-maximizing cable operator would choose the distant signal under a compulsory license regime and would only choose the cable-only source under a full copyright regime.[112]

88. The same logic applies when the cable system has unused channel capacity.[113] The existence of unused capacity is an indication that the value to viewers of additional channels is less than the cost of acquiring them, which, in turn, is indicative of diminishing returns to adding signals. Under these circumstances, a cable-only service that is not profitable to carry when a distant signal is carried, may well become worth carrying if the distant signal is dropped. As Besen notes:

> Thus, even cable systems with unused capacity can be expected to carry additional cable-only services if they are unable to obtain the rights to carry broadcast signals in free market negotiations. And as in the case of systems with limited channel capacity, this increase in the demand for cable-only program

services will result in an increase in the resources devoted to the production of programs for such services.[114]

89. Besides its adverse impact on viewers, the compulsory license introduces distortions into the use of television as an advertising medium.[115] The amount of resources devoted to commercial broadcasting and advertiser-supported cable are a function of the advertising value of such programs, but when a distant signal is retransmitted in a given local market, it is illegal under the compulsory license for the cable system to substitute local advertising for the national or distant-market advertising carried on the distant signal. As a result, local advertisers are denied the opportunity to compete for a valuable advertising vehicle and local viewers are forced to watch ads that may be less valuable to them than local ads. Under full copyright, in contrast, the cable operator who has acquired the rights to show a valued program is in a position to offer advertising space to the advertiser who values it most.[116]

90. Finally, all future television viewers are harmed when the compulsory license fails to emulate market negotiations and provides an implicit subsidy to cable vis-a-vis other exhibition outlets like DBS. Although cable may have seemed a fledgling industry in need of a subsidy to realize its full potential in the 1970s, no one can seriously argue that today's cable industry requires any special subsidy to be competitive with other exhibition outlets. Far from encouraging the efficient development of an infant industry, a compulsory license that fails to emulate market transactions encourages cable to develop in areas that might better be served by alternative exhibition outlets. Under full copyright, with all exhibition media competing for programs on the basis of market prices, the distribution of programs across different media will be based on the inherent economic and technological advantages of those different media rather than on any arbitrary advantage achieved through regulation.

91. In summary, the cable compulsory license can do no better than market negotiations under full copyright in guiding the decisions of program producers and exhibitors so as to maximize the value of the programming made available to television viewers; in fact, it is prone to do worse. There is no need to give the cable industry a special subsidy to encourage it to carry distant signals rather than other programs. However, the compulsory license provides just such an incentive, to the detriment of the overall welfare of television viewers.

D. ***The Foreclosure Issue***

92. Some commenters express the fear that, without the compulsory license, broadcasters will be able to "foreclose" cable systems from access to broadcast programming. The National Cable Television Association (NCTA) also suggests that Congress was motivated in part by this concern when it passed the compulsory license. In its comments, NCTA states that "[C]ongress was also apprised of the very real possibility that copyright holders would use their market control to exact exorbitant royalty fees or deny retransmission rights altogether."[117] We cannot guarantee that in every case programmers will grant cable retransmission rights. However, there is vigorous competition among program suppliers.[118] It is therefore unlikely that the overall supply of programming to cable could be limited in any significant way by witholding of product. The proliferation of cable networks also supports the proposition that foreclosure would be a fruitless strategy.

93. The key proposition with respect to foreclosure is that it is highly unlikely to occur given the structure of the video program delivery market today. The question of whether foreclosure was a real threat in 1976 is of limited significance in 1988. Nevertheless, those who assert that foreclosure was an important Congressional concern in 1976 offer little supporting evidence.[119] NCTA cites testimony by two cable industry officials. In 1975 testimony, the then-Chairman of NCTA indicated that cable wished "to avoid the possibility of having an unknown (royalty payment) amount established without a real control by us."[120] In arguing against setting the royalty payments via the market, he went on to suggest that there were, in essence, no substitutes for broadcast signals. However, this testimony did not explore the implications of the presence of large numbers of broadcast signals in most parts of the country. Nor did it consider the enormous desire of broadcasters for must carry protection. These factors strongly suggest that local broadcasters would be eagerly seeking and competing for cable carriage in a full copyright world, not exercising "market control" to deny retransmission consent. The relative abundance of local signals in most parts of the country, and the proliferation of cable networks suggest that at least some distant signals would behave similarly.

94. NCTA's other source is 1973 testimony by the general counsel of the Pennsylvania Cable Television Association. He describes some discussions that he and other cable officials had with representatives of the motion picture industry in which the latter argued for royalty rates substantially higher than those that cable interests wished to pay. His conclusion was that "fair, realistic, and responsible dealing with the copyright owners had been and is an utter impossibility."[121]

95. Although there is nothing in the House Report on the 1976 Copyright Act to suggest that Congress feared foreclosure or the exercise of market power by the broadcasters to extract excessive rates from cable operators, at least one independent commentator, looking back on the Congressional deliberation, has opined that the legislators *were* in fact concerned about foreclosure. During 1981 House subcommittee hearings on copyright and cable television, Bernard Wunder, the then-administrator of NTIA offered the following observations.

> The compulsory licensing feature that is central to the 1976 Copyright Act was adopted because its proponents had successfully argued two key points. First, they argued--and Congress accepted the argument--that cable's relative weakness in a programming market allegedly dominated by big television networks, big television stations, and big television program producers meant that, forced to bargain, cable television would lose out. In other words, they successfully argued that Government intervention to serve as an "equalizer" was necessary to make the programming market work for cable, and ultimately, for cable television subscribers.[122]

The NTIA administrator goes on to discuss the transactions costs rationale as well, and then suggests that, at least with respect to the "larger MSO-affiliated cable systems," there is no need for an "equalizer." He then concluded

that "the number of cable systems and interests that require such extraordinary Government assistance today is probably limited.[123]

96. The proliferation of cable networks since 1976, and indeed since 1981, when the above testimony was offered, has clearly reduced the importance of broadcast programming, particularly distant signals, as a source of material for cable television systems. An analysis of cable system statements of account filed with the Copyright Office shows that in July of 1986, the average "Form 3" cable system carried 3.381 distant signals. The comparable figure for July of 1980 is 3.768 distant signals.[124] Thus, the share of cable channels accounted for by distant broadcast signals has fallen. Cable networks are probably poorer substitutes for local than for distant broadcast signals. However, the broadcasters' continuing struggle for must carry protection belies the notion that local broadcasters might withhold programming from cable. Today, 53.8 percent of television households subscribe to cable.[125] In many cases, cable extends the reach of local broadcast signals or improves the reception available to households with off-air service. These factors lay to rest the fear that without the compulsory license broadcasters might withold programming from cable.

97. Those commenters who believe that, in the event that the compulsory license is repealed, cable operators will be foreclosed from access to programming offer little in support of that assertion. Some commenters, such as Cole, Raywid, and Braverman, simply assert that "[I]f the compulsory license were eliminated, distant television signals, and presumably local signals as well, would be withdrawn from more than 40 million cable television households throughout the United States."[126] NCTA and Turner Broadcasting System, Inc. (Turner) attempt to illustrate this claim with reference to sports programming, baseball in particular.

98. Turner claims that "compulsory licensing has enabled viewers in the 36 states without a local baseball team to receive the Atlanta Braves, carried on WTBS."[127] NCTA refers to the attempts of Doubleday Sports, Inc., the owners of the New York Mets baseball team, to impose copyright liability on Eastern Microwave, Inc., the satellite uplinker of WOR, the New York area television station with broadcast rights to the Mets games.[128] In that case, the U.S. Court of Appeals ruled that Eastern Microwave was covered by the "passive carrier" exemption in Section 111 (a) (3) of the Copyright Act.[129] The Court found that imposition of copyright liability on satellite carriers would "frustrate the congressional intent reflected in the [Copyright] Act by denying CATV systems the opportunity to participate in the compulsory licensing program."

99. It is certainly true that the major league sports place, or try to place some limitations on the distribution of television coverage of their games. They generally do this on a regional basis, choosing to reduce competition for attention (*i.e.*, attendance at games or viewing or listening to local broadcasts) to local games from imported broadcasts of distant games. In the days before satellite relays of broadcast signals became commonplace, they limited distribution via broadcast signals. Now, as more and more teams resort to satellite-delivered regional cable networks for local distribution of their games, baseball limits geographically the distribution of those networks.[130] It is likely that Doubleday Sports, Inc. filed its suit in an attempt to maintain control of the distribution of Mets games, so that it could limit "spillovers" of its games into the territories of other teams. There is no reason to assume that the goal was to limit access *per se*. Indeed, it is likely that Doubleday would have been quite willing to extend service to additional households not in other teams' territories if it had been practical to do so and receive compensation for it.

100. Currently, 20 of the 26 MLB teams have contracts for the distribution of some of their games via cable.[131] The arrangements include basic, premium, and pay per view services. The other six teams have local television contracts. At least some of the regional services have scrambled their satellite signals. Regional networks are permitted to market their signals in distant areas without local baseball teams (*e.g.*, Florida). If one is opposed to limitations of this nature, then it appears that the appropriate thing to do is to object to major league sports' antitrust exemption. However, the larger point is that sports programming, while very popular and important, is a special case. It is simply invalid to project the distribution practices of the sports leagues to other types of programming.

101. Furthermore, while in the absence of the compulsory license, there would undoubtedly be changes in the manner in which sports programming is distributed, it seems clear that such programming will continue to be widely available. In the case of baseball, as noted above, there is a trend to exhibition via regional pay networks delivered via scrambled satellite signal. Their geographic availability will be unaffected by changes in the compulsory license. Moreover, ESPN recently acquired the rights to carry approximately 175 baseball games each year. ESPN's contract with Major League Baseball covers the years 1990-93.[132]

102. This does not mean, of course, that baseball is unconcerned about geographic limitations on exhibition of games. Particularly in view of the Eastern Microwave case, we must take seriously the assertion by Turner Broadcasting that "baseball will not likely grant cable retransmission rights to a broadcast station."[133] However, just as the regional pay networks are permitted to sell their services in distant areas without local teams, it is possible that local broadcast stations might acquire cable retransmission rights for certain parts of the country.

103. With respect to other sports, press reports suggest that Turner's NBA contract allows for the transfer of coverage from WTBS to a cable service.[134] Furthermore, the NBA and the National Hockey League filed comments in this proceeding indicating their desire to license cable carriage of their games.[135] ESPN (a 24 hour sports network) carries a substantial amount of college sports, in addition to its extensive professional sports schedule. It recently signed a contract to carry a major post-season college football game--the Gator Bowl.[136] ESPN also will carry four other "bowl" games, some Ivy League football, and 27 College Football Association games next year.

104. The cable retransmission issue has not been particularly important with respect to the National Football League (NFL). With the exception of the recent contract for ESPN to carry some games, NFL games have been exhibited via network affiliates. Until recently there have been no network affiliates distributed by satellite carriers. The advent of "network superstations" has apparently been driven by the demand of the home satellite dish market rather than the cable market.[137] However, the

demand by cable systems for network superstations appears to be quite small at this point. This is probably due to the fact that most cable systems have access off-air or via microwave to local affiliates of the three major commercial networks. This, plus the network non-duplication rules, combine to limit cable system demand for these network superstations, given the abundance of non-broadcast programming available. (Under some circumstances, cable systems can carry broadcast stations on a less-than-fulltime basis; so conceivably they could "cherry pick" alternative NFL games.) Also, a very large amount of NFL programming is available across the country. CBS and NBC each normally offer two games every Sunday and ABC offers one every Monday. ESPN offers some Sunday night games. Every area generally gets at least three of the four games offered by CBS and NBC.

105. In summary, the market for program production is quite competitive, so it is unlikely that any producer could significantly affect the supply of programming to cable by withholding his properties from it. There appears to be no incentive for producers to do so.[138] This conclusion is underlined by the proliferation of cable networks. The only specific examples of alleged foreclosure proffered by commenters in this proceeding involve professional baseball. The limitations on exhibition of baseball games appear to stem from the antitrust exemption for baseball and not to be representative of other categories of programming. Furthermore, there is an immense amount of sports programming in general and baseball programming in particular exhibited over cable by cable networks other than superstations. This suggests that sports interests are ready, willing, and able to sell cable television rights to substantial amounts of sporting events.

E. *Is Copyright Protection Too Generous* ?

106. The Constitutional language in which copyright law is rooted authorizes the Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This language, although very general, indicates that the limited exclusive rights embodied in a copyright were viewed as the preferred instrument for encouraging the production of valued works, but that the promotion of creative activities rather than the rewarding of inventors was the primary social objective to be achieved. In other words, the language of the Constitution recognizes both a need to provide exclusivity in order to encourage the supply of valued works and a need to limit the terms of that exclusivity in order that works once produced be distributed as efficiently as possible.

107. Commenters in this proceeding who advocate repeal of the cable compulsory license in favor of full copyright liability generally emphasize the aspect of copyright that grants copyright holders the right to capture the full value of the works whose copyright they own; whereas, those advocating retention of the compulsory license emphasize the need to accommodate the interest of the viewing public in having valued works receive as widespread distribution as possible. In fact, of course, there is merit in each of these views, but neither gives a proper sense of the inherent conflict between these two objectives and the need in designing copyright arrangements to balance the interest of the public in having good incentives for program producers to supply valued works against the interest of the public in having the works that are supplied distributed in the most efficient way possible.

108. Copyright protection is not an all or nothing proposition, and the extent to which the owner of a copyright can extract economic value from the copyright will vary according to the number of years for which the copyright is valid, the particular uses of the work for which the copyright is valid, and the type of compensation to which the owner of the copyright is entitled. There is no copyright liability, for example, when an individual tapes a program off the air for his or her own use. There is full copyright liability, in contrast, when a broadcaster shows a program; and the owner of the program is free to set the terms under which the program can be shown. The compulsory license represents an intermediate arrangement under which the owner of the copyright is entitled to compensation but is not free to set the terms under which the program can be shown and must accept whatever compensation is forthcoming from the administrative process that determines the distribution of compulsory license fees.

109. Neither the courts nor the Congress have questioned the underlying principle that copyright holders should be compensated and that the preferred method of compensation is the granting of exclusive rights for the life of the copyright. Furthermore, as we have already argued at length, the compulsory license introduces distortions into the video marketplace that make viewers worse off than they would be under full copyright. Implicit in this argument, however, is an acceptance of current copyright terms (generally, life of the author plus 50 years) as appropriate. It remains to discuss the argument of those opposed to replacing the compulsory license with full copyright liability that the compulsory license strikes a better balance than would be struck under full copyright between the interest of viewers in having existing programs more widely available and the interest of viewers in promoting the supply of new programs. This report does not presume to provide a comprehensive analysis of optimal copyright arrangements. However, the following general observations suggest that, in fact, these interests are better balanced under full copyright liability.

110. First, if the objective of copyright arrangements is to maximize consumer welfare, authors are entitled to the bare minimum compensation that will induce them to create new works valued by consumers. Ideally, such compensation should come in a form that allows the program to be exhibited in a way that maximizes consumer welfare right from the start. Any compensation scheme that pays the author more than the minimum necessary to produce the work transfers income from viewers to the author and encourages program owners to restrict distribution of their programs in ways that lower consumer welfare.

111. Excessively generous copyright protection lowers consumer welfare, but so too does inadequate copyright protection. The complete elimination of copyright protection, for example, would allow people to enjoy an author's work without paying anything for it, severely reducing the amount of work that would be forthcoming unless an alternative method of compensation is developed to provide authors with sufficient remuneration so that they have an incentive to develop new works. Without an alternative compensation scheme, too few valued works will be produced. Such a compensation scheme

might, for example, provide direct government subsidies to authors on the condition that any works produced be placed in the public domain. There are, however, numerous difficulties with such a subsidy scheme, and the remainder of this discussion is based on the premise that the copyright framework provides the best mechanism for encouraging program development.

112. Viewed in the context of achieving a proper balance between incentives to develop new programs and incentives to distribute existing programs efficiently, compulsory license arrangements should be adopted only if there is reason to believe that full copyright provides "excessive" market power in the sense that the value to consumers of programs that are produced under full copyright but that would not be produced under the compulsory license is less than the gain to consumers from a wider distribution of the programs that would continue to be produced under the compulsory license. There are, however, two important reasons to doubt that the cable compulsory license makes such a contribution to consumer welfare.

113. First, there is sufficient competition among program suppliers that most are severely constrained in their ability to limit distribution of their programs in order to earn excess profits. Any producer with an "average" program who offers his program on terms that are substantially more restrictive or expensive than other "average" programs will have difficulty finding a buyer.[139] This is not to deny that there will be some programs that turn out to be sufficiently attractive to viewers that their value greatly exceeds their production cost; but unless this is the case for most programs, such highly profitable programs should be viewed as analogous to the "gushers" that offset the "dry holes" when drilling for oil. Thus, if the terms of full copyright are set properly, competition in the program supply industry will ensure that program suppliers earn only normal competitive profits even under full copyright, in which case the compulsory license offers no advantages compared to full copyright and all the disadvantages discussed in this report.

114. Second, there is little in the legislative history of the 1976 Copyright Act or the record developed in this proceeding to suggest that the purpose of the cable compulsory license was to reduce the compensation afforded to producers below what it would be under full copyright, but even if the terms of full copyright are judged to be too generous, the cable compulsory license is not an appropriate remedy. Although it might partially offset some of the consumer welfare losses from generous copyright protection, the cable compulsory license introduces counterbalancing distortions into the program acquisition market that lower consumer welfare.

115. The most direct way to strike a different balance between the incentives to produce and the incentives to distribute existing programs more efficiently would be to change the life of the copyright. It might also make sense to provide for a limited term of full copyright followed by compulsory licensing for all exhibitors. However, it does not appear that singling out one type of programming in one distribution outlet for separate treatment under a compulsory license is, given current institutional arrangements in program distribution, an efficient method of adjusting the balance between these incentives. We therefore believe that the question of whether there should be a compulsory license for programs acquired via distant signal should be decided based on an analysis of whether the transactions costs of market negotiations are large enough to outweigh the economic efficiency costs of the compulsory license.

IV. The Practicality of Full Copyright Liability

Introduction

116. The previous section discussed the consumer welfare benefits of eliminating the compulsory license. In this section, we consider whether the compulsory license can be replaced by full copyright liability with a manageable level of transactions costs. In a full copyright liability regime, copyright holders, broadcasters, and cable operators would be free to negotiate a variety of mechanisms for cable retransmission of broadcast signals. Commenters suggest several specific possibilities, which we review below. Individual negotiations by every cable system with the owners of every program retransmitted by the system, the scenario mentioned in the House *Report* on the Copyright Act of 1976, is one of them. In our judgment, however, a "networking" approach is the most likely. Broadcast stations now widely carried as distant signals, on a national or regional basis, would become "retransmission rights packagers" (a function analogous to that performed by networks), acquiring national or regional cable retransmission rights for their programming, and marketing their channels to cable systems, acting in the role of "affiliates."

117. Important developments in the 12 years since the compulsory license was adopted suggest the practicality of alternative arrangements. Today, dozens of full copyright cable networks are flourishing. Furthermore, the incidence of multiple cable system ownership has increased, which suggests that transactions costs, on a per subscriber basis, are lower than before.[140] The presence of a multitude of cable networks demonstrates that entrepreneurs are ready, willing, and able to assemble programming on a full copyright basis for the cable industry. It suggests that, with the proper incentives, entrepreneurs would come forward to acquire cable retransmission rights for programming on television broadcast stations. If transactions costs (*i.e.*, the costs that cable systems would incur to acquire retransmission rights to broadcast programming under full copyright liability) are, in fact, moderate in magnitude, then a crucial justification for the compulsory license is not now valid. While the cable network analogy is less precise in the case of local signals, we believe that local stations could and likely would step into the role of retransmision rights packager, with cable systems in their local service areas akin to their affiliates.

118. In the next subsection, we review and analyze the alternatives to the compulsory license proposed by commenters, as well as the arguments of those who advocate retaining it. We also discuss a few proposals to modify the compulsory license. In the following subsection, we consider in some detail the manner in which broadcast stations might operate as retransmission rights packagers. This subsection also discusses the one quantitative estimate of which we are aware of the transactions costs that a superstation would incur in acquiring cable retransmission rights to its programming. The final subsection includes a brief description of transactions costs under the current regime.

The Compulsory License and Market Alternatives

119. Commenters were fairly evenly divided on the subject of the compulsory license, with 17 in favor of retaining it, 12 in favor of eliminating it, and two expressing no opinion.[141] Proponents of the compulsory license stress two main arguments. First, they argue that Congress' 1976 conclusion regarding the high transactions costs of full copyright liability remains valid.[142] Second, they argue that, since the broadcasting and program production industries are thriving, there is no need for a departure from an established system.[143]

120. With respect to transactions costs, defenders of the compulsory license generally repeat the 1976 *House Report* statement that requiring every cable system to negotiate with every copyright owner for retransmission rights would be unduly burdensome.[144] NCTA goes on to assert that "it would be difficult for a cable operator to know in advance on a daily basis what particular programs are being aired in order to ascertain whether he has the appropriate clearances or must black out the programs" (citation omitted).[145] Commenters opposing elimination of the compulsory license also generally assert that market arrangements would not develop and, in many cases, forecast that cable retransmission of distant, and even local, broadcast signals would end.[146]

121. A few commenters suggested modifications in the compulsory license that, in their view, would improve it. Some advise that the system should be retained, but that the royalty rates should be increased.[147] One suggests reducing the distant signal royalty rate to zero.[148] In a somewhat similar vein, Geller and Lampert suggest that the Commission withdraw distant signal authorization for the top 100 markets, noting that "the compulsory license is available only for the ' . . . carriage of signals permissible under to rules, regulations, or authorizations of the Federal Communications Commission.[149]

122. MLB proffers four suggestions for improving the operations of the compulsory license.[150] They are: 1) simplify it to reduce transactions costs (although no specific measures to effect simplification are mentioned); 2) overturn the *Cablevision* case;[151] 3) speed up the distribution of royalties (again, no specific measures are proposed, but this point appears to overlap with the first one); and 4) refrain from extending the compulsory license to new media.[152]

123. The U.S. Copyright Office also has some suggested improvements.[153] It advocates changing the royalty formula to one based on a flat charge per cable subscriber. Also, it suggests that any future changes in Commission rules that might affect royalty payments should be made effective as of the first day of a compulsory license royalty payment accounting period. In addition, it requests that the Commission improve its liaison with the Copyright Office on matters relating to interpretation of present and former Commission rules.

124. *Market Alternatives.* The range of alternatives proposed by commenters recommending elimination of the compulsory license is spanned in the comments of the National Telecommunications and Information Administration (NTIA).[154] NTIA outlines four "possible mechanisms by which suppliers could convey performance rights to cable operators."[155]The proposals of other commenters, while worded differently, correspond to one or more of the NTIA scenarios. The four NTIA options are: 1) direct negotiations between cable systems and copyright holders for cable retransmission rights; 2) the "networking" option; 3) blanket licensing; and 4) a negotiated license, such as the Copyright Act provides for noncommercial broadcast rights.

125. Under the first option, cable operators would assemble packages of broadcast programming to retransmit by negotiating with individual copyright holders. In essence, this is the regime that Congress branded "impractical and unduly burdensome." The main advantage of this "*a la carte*" approach, in NTIA's view, is that license fees accurately reflect the market value of each program, providing good information about consumer preferences for each. The main disadvantage is high transaction costs, although NTIA notes that a clearinghouse with information on ownership of program rights and, perhaps, licensing terms, could facilitate the acquisition of retransmission rights. ABC also notes the possibility that "a third party broker similar to Viacom" could arise to serve as an intermediary between cable operators and program suppliers.[156]

126. MPAA also advances this suggestion, noting that cable operators might "negotiate directly in competition with broadcasters for performance rights to programs."[157] MPAA cites examples of this phenomenon from the trade press, and, in its comments in the syndicated exclusivity proceeding, describes several cable channels that have been created using this mechanism. One of the descriptions in the trade press refers to regional cable channels "carrying syndicated and original programming and sometimes resembling independent television stations."[158]

127. NTIA's second mechanism is, in essence, the networking option--broadcast stations buy cable retransmission rights along with the broadcast exhibition rights that they normally acquire.[159] Under this regime, NTIA points out, stations could license cable retransmission either of their entire program day or of specific dayparts. The major advantage is relatively low transaction costs, since "[B]roadcasters currently purchase broadcast exhibition rights and need only add cable retransmission rights to their lists of negotiated items."

128. NTIA sees a problem with such an arrangement, however, raising the possibility that "this mechanism could expose broadcasters to a considerable amount of financial risk." The risk is apparently that broadcasters might make inaccurate estimates of the value cable operators place on programs, and end up agreeing to pay more for cable retransmission rights than they could recoup in fees from cable systems.

129. Two of the "marketplace models" advanced by MPAA are networking arrangements for the acquisition of cable retransmission rights.[160] First, MPAA asserts that cable operators could acquire cable retransmission rights directly from distant signal broadcasters, in cases where the broadcaster has those rights. Second, MPAA suggests that willing superstations could become networks. They could either acquire cable retransmission rights *in addition to* local broadcast rights to their programming, or "simply make the transition from broadcaster to cable network." The two options are quite similar. It appears that the difference is that, in the first case, MPAA is referring to less than a full schedule of programming, perhaps only to that produced by the station (for which the broadcaster would normally hold the copyright).

130. These proposals are echoed by ABC with slightly different terminology.[161] ABC asserts that, under full copyright liability, superstations, either national or regional, would need to decide whether or not to embrace

that status. With respect to "willing" national superstations, ABC suggests that they "would formally bargain for national cable transmission rights for all of their programming, as their nonbroadcast competitors have done for years." "Willing" regional superstations "could simply add one additional item to the agenda in bargaining with program owners: the right to authorize regional transmissions via cable." While asserting the practicality of this arrangement, ABC notes that "the transaction cost problems of delivering regional superstation signals to cable systems through a free market device may be more complex than those presented by national superstations." ABC points out that in either case, the superstation would be entitled to charge a fee to cable systems for the right to retransmit its signal.

131. No opponents of eliminating the compulsory license critique the "networking" option or, indeed, the individual negotiation option, in more than cursory terms. In its reply comments, NCTA claims that "insurmountable practical barriers to the carriage of broadcast signals (particularly local and regional signals) are presented by the need to obtain station-by-station, program-by-program clearances and the gaps that will result from the denial of such clearances."[162] This statement ignores the possibility that broadcast stations might serve a regional or national networking function, and *assumes* without corroborating analysis that cable operators would have to keep track of individual program clearance rights on a daily basis.[163] NCTA does, however, concede that "purchasing agents" may emerge to exploit the economies of scale present in cable carriage of national 'superstations,' while asserting that "it is unlikely that such mechanisms would develop for the carriage of regional distant signals."[164]

132. Blanket licensing is the third mechanism proffered by NTIA. As do the other commenters that mention this, NTIA refers to blanket licensing agencies that handle performance rights to music, such as ASCAP and BMI. With blanket licensing for cable retransmission, one or more associations of copyright holders, such as the MPAA and/or sports interests (*e.g.*, Major League Baseball), would grant blanket licenses to cable operators for retransmission of some or all of the broadcast programming to which the associations had rights.

133. Comments submitted by the three major music performing rights societies, the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. also support this option.[165] These groups now participate in CRT distribution proceedings as the "Music Claimants" group. They suggest that, since they are authorized to grant rights to essentially all copyrighted music, cable systems could acquire needed music rights under full copyright liability at low transactions costs. They also suggest that "the collective licensing we undertake serves as a model for other types of copyrighted works. We would expect such collective licensing mechanisms to develop with the abolition of the compulsory license."[166] ABC also suggests that a performing rights society, similar to ASCAP and BMI, might develop.[167]

134. A blanket licensing approach for broadcast retransmissions would likely require some sort of antitrust law exemption to allow the rights holders to establish license fees and to divide the royalties among their members. ASCAP and BMI currently operate under consent decrees.[168] Moreover, the Copyright Act now confers exemptions from the antitrust laws on claimants before the CRT, in order to allow them to negotiate proposed divisions of royalties that are then presented to the CRT.[169]

135. NTIA sees low transactions costs as the strength of this mechanism. The weakness, in NTIA's view, is that it would not encourage competition among program producers. A few commenters refer to the protracted litigation in which ASCAP and BMI have been involved, claiming that it shows the impracticality of performing rights societies. Time, Inc. refers to "continuing antitrust actions challenging the legality of the blanket licenses the organizations issue."[170] Turner Broadcasting System, Inc. (Turner) notes that the ASCAP consent decree contains a mechanism for judicial determination of "reasonable fees' in the event of controversies between ASCAP and its licensees. Turner then asserts that this "judicial mechanism" has been needed frequently.[171] ASCAP, BMI, and SESAC respond to these points by noting that the challenges to the blanket license have all been rejected and that, the relevant court has never had to determine reasonable fees after trial (although the voluntary agreements reached between ASCAP et al. and licensees have often been reached with judicial assistance).[172]

136. NTIA, while stating its preference for a cable retransmission rights regime that is private, proffers as its fourth option a "second best alternative." This is a negotiated license such as the Copyright Act provides for noncommercial broadcast rights.[173] The Act requires copyright owners and public broadcasting entities to "negotiate in good faith and cooperate fully with the Tribunal in an effort to reach reasonable and expeditious results." Only if they do not do so does the CRT step in and set rates and the division of royalties. The Act grants the relevant parties an exemption from the antitrust laws for this purpose.

137. This proposal is actually somewhat similar to the current regime. Copyright claimants are now entitled to bargain among themselves over the division of royalties. They have an antitrust exemption for that purpose, and the CRT is required to distribute the royalties (after deducting its reasonable administrative costs) according to the claimants' agreement, provided that there is not a "controversy" over the division.[174] The difference is that in the public broadcasting case, the rate levels are also subject to negotiation, while for cable retransmission the levels are set by the CRT according to procedures laid down in the statute.

138. The only explicit ranking of alternative regimes (other than NTIA's statement that a negotiated license is not the first choice) is made by Besen, in a statement submitted by MPAA. After analyzing alternative program distribution techniques under full copyright liability and noting the economic incentives to hold down transaction costs in that setting, he comes to the following conclusion:

> [T]here are several ways in which such transactions costs could be limited in the case of cable television, but one seems especially likely: broadcast stations that wished to engage in the business of exporting their signals to cable systems would enter the "network" business. (footnote omitted)[175]

Besen also illustrates the manner in which networking reduces the number of transactions that program suppliers and broadcast stations (or other types of affiliates that

exhibit programming) must undertake. In his example, there are 200 broadcast stations with 150 television programs on their weekly schedule. If each station negotiates with each program supplier, a total of 30,000 (200 x 150) transactions are required. However, if the 200 stations affiliate with a network, the number of transactions is reduced to 350 (200 + 150), since each station and each program supplier negotiates once with the network.[176] Similarly, a local broadcast station acting as an intermediary between program suppliers and cable systems (the functional equivalent of "affiliates" of the local broadcast station) could reduce the number of transactions that would be needed for the cable systems to acquire retransmission rights to programming carried by the broadcast station.

139. *Analysis of Market Alternatives.* Our analysis of the alternatives leads us to conclude, as did Besen, that, with full copyright liability, broadcast stations will likely function as networks, acquiring cable retransmission rights to some or all of their programming, and marketing those rights to cable system affiliates. We believe that this method is efficient and practical. However, with full copyright liability, other options are possible and may co-exist with networking. In particular, it is probable that there will continue to be instances of direct acquisition of retransmission rights by cable systems from copyright owners.

140. The ability to reduce transactions costs is a key characteristic of a network. Existing networks negotiate carriage agreements with a group of affiliates, which may be broadcast stations, cable systems, MMDS or SMATV operators, or some combination of these outlets. The network offers a package of programming for which it has negotiated exhibition rights with program producers and copyright holders. Thus, it is unnecessary for each affiliate to negotiate with each copyright holder. On the other hand, since a separate agreement may be made between network and copyright holder for each program, it remains possible for producers to be compensated according to the value that consumers place on each program. The information transmission and incentive provision characteristics of a market process are preserved.[177] This mechanism could be employed by local broadcast stations, as well as those retransmitted nationally or regionally.

141. NTIA raised the possibility that broadcasters who entered into the network business might face significant financial risk. The risk derives from the possibility that broadcasters might overestimate the value cable operators place on broadcast programming. This could lead them to pay excessive fees for cable retransmission rights, and to lose money on their networking business. This fear is, in our view, exaggerated. We think it likely that, in the absence of the compulsory license, information on cable operator valuation of broadcast signals would develop rapidly, based in part on audience data for currently-carried signals. Furthermore, cable retransmission rights contracts could easily be written in terms of a percentage of the revenues realized by the broadcast station from cable retransmission. This would minimize the "financial risk" referred to by NTIA, should broadcasters wish to do so.

142. Some programming may also be offered under a blanket license. NTIA suggests that blanket licensing does not encourage competition among suppliers of programming. We believe that NTIA is too pessimistic on this count. While it is certainly true that the opportunity to be compensated directly and individually spurs competition among producers, NTIA may underestimate the ability of a blanket licensing system to reward producers in proportion to the value of their product.

143. Distribution of royalties under a blanket license would likely be based on monitoring of the use of programming, with popular shows getting bigger returns. Furthermore, at least in principle it is possible for more than one performing rights association to coexist (*e.g.*, ASCAP and BMI). Since dissatisfied producers could form or threaten to form their own association, or even to license on an individual basis (as is done with certain music rights), there would be continuing pressure on blanket licensing agencies to make their royalty distributions reflect the relative values of individual programs. While blanket licensing compensation is unlikely to do so as well as a full-blown market process would, the failure to relate compensation to relative valuation with reasonable precision could lead to the disintegration of the association. In making the decision to join or not to join a particular performing rights organization, rights holders can explicitly trade off the presumed transactions cost savings of the blanket license against possible reduced compensation. Other things equal, the blanket license would be more attractive for low-valued programming, where transactions costs account for a relatively high fraction of compensation.

144. Thus, while the blanket license has some similarities to the compulsory license, there are two important difference between it and a blanket license imposed via market process. First, under the compulsory license, the government sets the level of fees. Second, a market process leaves copyright holders with the *option* of joining a performing rights organization and participating in the blanket license.

145. As our conclusion that the compulsory license should be eliminated implies, we do not see adjustments in the royalty rates up or down, whether by the CRT or the Congress, as an adequate solution. As noted in Section II, the CRT is severely limited in its authority to adjust the basic rates that account for the bulk of cable television royalty payments. Moreover, it is difficult to see how legislated changes in the rates would allow the flexibility to respond to changes in the marketplace that we believe is needed if consumers are to have as diverse and bountiful menu of programming as possible. On the other hand, we believe that Geller and Lampert's suggestion to ban distant signal importation in the top 100 markets goes too far. It would, in all likelihood, reduce the options available to consumers in those markets below what they would have in a full copyright liability environment. Thus, we decline to accept this recommendation.

Networking As A Mechanism for Marketing Cable Retransmission Rights

146. We turn now to a more detailed discussion of how the networking process might work in a full copyright liability environment. Of necessity, this involves an element of informed speculation. This is because while the compulsory license remains in effect, the incentives for the institutions described to develop are generally not present. Nevertheless, the operations of numerous full copyright cable networks, and the initial reactions of some "superstations" to our new syndicated exclusivity rules provide some relevant "real world" analogies for this task.

147. For purposes of exposition, our discussion is divided into three parts. National distant signals, regional distant signals, and local signals are addressed separately. The statute spells out the difference between local and distant signals for copyright purposes.[178] Congress determined that cable retransmission had a different effect on distant and local signals. This determination led Congress to make the compulsory license for local signals essentially royalty free.[179] Furthermore, the compulsory license for local signals was related, in a policy sense, to the Commission's former must carry rules. There is some sentiment in Congress and elsewhere to reimpose some sort of must carry rules. Additionally, many commenters stress the local compulsory license-must carry nexus. For these reasons, it is advisable to treat the local compulsory license separately.

148. There is no precise criterion for distinguishing regional and national distant signals, or "superstations." Roughly speaking, national superstations are those that are delivered by satellite and marketed throughout the country. Regional superstations are generally delivered by microwave to cable systems in the same general part of the country. From a policy point of view, the major distinction appears to be that for regional superstations the local programming is of some interest to cable viewers outside the local market. For example, local news and public affairs programming produced by a big city television station could well be of interest to regional viewers outside of the station's broadcast service area. These characteristics may lead to differences in the type of networking arrangements that national and regional superstations develop.

149. *National Superstations.* National superstations are aimed at a national audience. In other words, they do not, as a rule, run programming of interest solely or primarily to viewers in one region of the country. In a full copyright liability regime, we believe that such stations would find it efficient to purchase national rights to their programming and sell national advertising. In 1976, the practicality of such arrangements may have been in doubt. There were only two satellite-delivered services--the predecessor of WTBS and Home Box Office. But today there are many nationally-distributed cable networks,[180] showing that the transactions costs of such a regime are not insurmountable.

150. The presence of full copyright cable networks is the strongest piece of evidence supporting the conclusion that some broadcast stations could evolve into networks serving cable system affiliates. However, this conclusion is reinforced by certain actions already taken or announced by some national superstations. In fact, WTBS--the premiere national superstation--is apparently already in the process of becoming a cable network. A trade publication quotes Ted Turner as saying that "no matter what [the] FCC does, WTBS will continue, changing gradually from superstation to cable network."[181]

151. The reported reactions of Turner Broadcasting and Tribune Broadcasting to the Commission's new syndicated exclusivity rules also suggest that national superstations will find it quite possible to acquire national rights, exclusive or non-exclusive, to their programming. One fear that some parties expressed during the syndicated exclusivity rule making was that cable subscribers (and home dish owners) would lose superstation service. The scenario was that the exercise of syndicated exclusivity rights by local broadcast stations would result in large chunks of superstations' programming being "blacked out." The alleged costs and problems associated with doing this and replacing the deleted programming with alternative material would cause many cable systems to drop superstations. When superstation subscribership sank below a critical mass, it would no longer be economical to keep them on the satellite.

152. A senior official of Turner Broadcasting, commenting on the syndicated exclusivity rules, is quoted as saying that "WTBS will take the new rules in stride if it has to," and that the station "will not lose cable affiliates or cable homes because it will not schedule programming susceptible to being blacked out."[182] A similar determination is reflected in a trade press account of an interview with a senior official of Tribune Broadcasting:

> Tribune will do whatever it has to do to keep WGN-TV and three of its other stations (WPIX[TV] New York, KTLA[TV] Los Angeles and KWGN-TV Denver) on the satellite. The out-of-market coverage is critical to the barter programming the stations air and in which Tribune has an interest, he said. Tribune may sue, or it may decide to fill out its schedule with nonexclusive national programming and live with the rules, he said.[183]

While less upbeat than Turner, Tribune apparently believes that it can program its stations with material for which it has national rights.[184] Moreover, United Video, the satellite carrier of WGN, has contingency plans "to put programming on a second satellite for any holes in WGN's schedule," that might be caused by the failure of WGN to secure national rights to some of its programming.[185] WGN-TV is the second most popular superstation.

153. We know of only one attempt to estimate the costs and revenues that a full copyright "superstation" could expect to incur. The estimate appears in a 1981 report of the NTIA.[186] The approach is "to examine the cable households and viewing shares of an independent station on distant cable systems, and regard the distant cable households as though they composed the over-the-air market of an independent station." The NTIA analysis considers the costs of acquiring programming and satellite transmission capacity and the additional revenues that cable systems would earn from an extra distant signal under full copyright liability. The latter includes both advertising revenues and revenues from additional subscribers attracted by the extra signal. The conclusion is that a "network" run by or for cable systems to provide a distant broadcast signal (or its full copyright equivalent) is economically feasible. In the course of the calculations, it is suggested that copyright holders' compensation would be 50 percent higher than that under the compulsory license, based on 1979 rates, and 30 percent higher based on the inflation-adjusted 1980 rates.

154. The analysis is derived from an examination of the 1979 schedule of WOR-TV, deemed a typical superstation. It yields an upper bound transactions cost estimate of $0.10 per subscriber per *year*, or less than a penny per month, based on the approximately two million distant cable subscribers reached by WOR-TV in 1979. While the total transactions costs have doubtless risen over the last nine years, so has the number of distant cable subscribers to WOR and other superstations (not to mention the

growing number of home satellite dish subscribers). WOR-TV now has approximately 12.5 million distant cable subscribers.[187]

155. The foregoing does not allow us to estimate precisely the transactions costs of assembling the programming for a full copyright "superstation." Nor can we know what level of transactions cost per subscriber is supportable in the marketplace. Nevertheless, the transactions cost estimates, coupled with information about current levels of distant signal cable subscribership,[188] suggest that the transactions cost burden is quite manageable.

156. From a public policy point of view, it is irrelevant whether viewers receive national programming (such as movies and first run or off network entertainment series) via a national superstation or a regional one. Thus, as long as entry into or evolution into cable networking is relatively easy, then we can rely on market forces to provide a satisfactory menu of national programming.[189]

157. *Regional Superstations*. With full copyright liability, regional superstations may survive as such, may die out, or may evolve. In such a regime, regional superstations would certainly be free to negotiate for regional cable retransmission rights with copyright owners. To the extent that "regional" connotes relatively limited cable retransmission, however, the reward might not be sufficient, particularly given competition from concurrently-developing national full copyright superstations. Program owners seeking national exposure for their product might well find it more efficient to deal with such an entity rather than assemble national cable coverage via a patchwork of regional stations. When regional retransmission rights *are* available, the station may encounter difficulties in acquiring rights for the same region (or roster of cable system affiliates) for each program it wishes to carry. This too could reduce the efficiency of regional distribution.

158. If the key ingredient of a regional superstation is, in fact, locally-produced programming, such as news and public affairs, then, to the extent that the station holds the copyright on such programming, it would be free to license that programming to cable systems in the relevant region.[190] They could exhibit this material on a cable channel that the operator "programs" itself. Such a channel could include broadcast material drawn from one or more "regional superstations," plus material from cable services, programming produced by the cable system itself, or other material. An example of this type of programming is found in San Diego, where two cable systems owned by Cox have contracted directly with a Los Angeles network station--KNBC-- for four daily newscasts, three local and one drawn from the NBC Nightly News. They are exhibited on a channel that also includes partial feeds from three cable networks and some local programming.[191]

159. It is also possible that regional superstations might, under full copyright liability, acquire regional retransmission rights to some but not all of their purchased programming. This could include, but would not be limited to, sporting events of regional interest. Regional superstations might develop blocks of time in their daily schedules suitable for licensing to cable systems in the region. These blocks could include programming produced by the station and some for which regional rights were purchased.

160. *Local Signals*. With respect to local signals, the Copyright Act imposes a compulsory license and a royalty rate that is virtually zero.[192] This reflects the original judgment that "there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners."[193] Under this theory, a program producer licenses product to the local television station, assuming it will be made available to 100 percent of the local viewing area. The amount paid would include the right to reach the local audience, the means being irrelevant. As MPAA points out, however, in today's marketplace cable retransmission may be regarded as a separate market and an additional source of revenue. This assertion is proven in those instances where program producers license programs to both local television stations and cable networks.

161. Local broadcast stations are currently the most popular viewing option, even for cable consumers. Recent Nielsen data show that 62.3 percent of viewing in cable households is devoted to network affiliates, public television stations, and local independent broadcast stations.[194] We believe that local broadcast stations will remain extremely popular with cable operators, because those stations are highly valued by viewers. While leading cable networks, such as ESPN, WTBS, and USA have achieved close to 100 percent penetration of cable households, they continue to have relatively low ratings.[195] Thus, cable operators still attract the majority of their viewers because of their broadcast retransmissions. Moreover, we believe that local broadcast stations are and will remain extremely attractive to program producers as local distribution channels. They are efficient, since they offer close to 100 percent coverage of television households in their service areas. In contrast, cable penetration is 53.8 percent of television households.[196] Programmers also benefit from the popularity of local stations based on their local programming and community involvement. Vesting retransmission rights in copyright holders would permit broadcasters to guard these values into the future.

162. Under full copyright liability, broadcasters would have extremely strong incentives to acquire local cable retransmission rights. The vigor with which the broadcasters have fought for must carry rules demonstrates that. Because producers believe broadcast signals have value, we think it likely that local broadcasters will be able to add cable retransmission to their program rights negotiations agendas and to assemble a package of those rights that can then be transferred to local cable systems.[197] Full copyright liability would permit broadcasters to acquire and control the distribution of programming in a more balanced competitive environment than that which now exists between broadcast stations and cable services. Cable operators would compensate broadcasters for the retransmission of their signals in direct relation to the value viewers place on the signals, as currently occurs with cable services. One additional feature of full copyright liability for local signals is that, in addition to pecuniary matters, local broadcast stations could also negotiate for specific channel assignments on the cable systems. More importantly, viewers would benefit from the additional and/or improved programs stimulated by this more healthy environment.

163. Various commenters have proposed to maintain the compulsory license for local broadcast signals only and to condition it on observance by cable systems of some sort of must carry rules.[198] In early 1988, Congressman Bryant introduced H.R. 4293, the "Cable Subscribers Protection Act of 1988."[199] This bill would condition a compulsory license for local broadcast stations on obser-

vance of the Commission's most recent must carry rules (which were struck down by the Court of Appeals), while eliminating the compulsory license for distant signals. A similar bill was introduced by Senator DeConcini.[200]

164. We believe that, as a matter of logic, must carry rules without the compulsory license would surely alter the balance of bargaining power between the copyright holders and cable systems that would be negotiating retransmission rights. In particular, this situation would likely lead to increased leverage on the part of copyright holders and broadcast stations. Cable operators would be required to acquire rights to local broadcast signals and could not credibly threaten, in the course of negotiations, to refuse to purchase the retransmission rights. If the Congress should adopt legislation reimposing some sort of must carry rules, then we would recommend that retention of some sort of compulsory license for local broadcast signals be considered.[201]

Transactions Costs Under the Copyright Royalty Tribunal

165. In 1976, it was impossible to forecast the level of transactions costs that would be associated with the compulsory license/CRT method of compensation. After 10 years of experience with the CRT, some data and informed opinion are available, both from the comments of participants in CRT proceedings and from CRT decisions and reports. The costs of the system have been borne primarily (but not exclusively) by copyright holders. Some costs have also accrued to cable systems. While most costs of supporting the government bodies that supervise the process (*i.e.*, the CRT and the Licensing Division of the U.S. Copyright Office) are defrayed by deductions from the royalty funds contributed by cable operators, some funds from general tax revenues are also used. While the data do not permit a precise estimate of the transactions costs of the compulsory license system, they do suggest that the cost is non-negligible.

166. Copyright holders face three types of transactions cost under the present system.[202] They are: 1) participation in distribution and rate adjustment proceedings of the CRT (including appearances before that body and settlement negotiations among themselves) ; 2) litigation associated with these proceedings; and 3) underwriting the expenses of the CRT and the Licensing Division of the U.S. Copyright Office. Cable operators participate in CRT rate adjustment proceedings and associated litigation, and also incur the costs of filling out Statements of Account twice each year and submitting them to the Copyright Office. Some cable operators hire outside counsel to prepare and review the Statements of Account. While these costs are probably not large on a per-system basis, when summed over roughly 11,000 entities that are required to file them, the total is significant.

167. Participation by copyright holders in CRT distribution proceedings involves negotiations with other copyright holders in an effort to agree on the division of funds without recourse to the CRT, litigation of any remaining disputes before the CRT, and, in many cases, appeal to the D.C. Circuit of unfavorable decisions. The CRT's rate adjustment proceedings also present costs--of preparing and submitting testimony to the CRT, and of appeal to the D.C. Circuit in the event of an unsatisfactory outcome. Two of the CRT's three rate adjustment proceedings have been appealed, as were six of the eight distribution proceedings that have been completed to date. The rate adjustment proceeding that took place in response to the Commission's 1980 decision to rescind its distant signal importation and syndicated exclusivity rules was a major undertaking.

168. The costs incurred by copyright holders for participation in CRT proceedings are discussed by ABC, ASCAP, BMI, and SESAC, the Canadian Broadcasting Corporation, and MLB.[203] MLB offers the most extensive discussion of transactions costs.[204] It notes that "copyright owners have had to incur substantial internal costs as well as legal, consulting, and witness fees" in order to support their cases before the CRT and to enable them to engage in settlement negotiations with each other.[205] MLB also mentions several other types of proceedings in which copyright holders have been required to participate in connection with the compulsory license. They include Copyright Office rule makings to construe cable provisions of the Copyright Act, litigation challenging such rules, and Congressional hearings. MLB refers to "serious differences of opinion on how the Copyright Act should be construed" between cable operators and copyright owners" that have led to many "individual disputes, some of which have led or likely will lead to litigation." [206] Moreover, MLB notes that copyright owners must "monitor the more than 15,000 statement of account filings and royalty payments which are now being made by the cable industry each year with the Copyright Office."

169. The number of hearing days devoted to cable copyright matters by the CRT provides a crude indicator of the magnitude of the disputes involved and the costs of the process. MLB asserts that "some 200 hearing days" were needed to "resolve controversies over just the 1978-84 funds."[207] A review of CRT annual reports and other documents yields 237 hearing days for the 1978-85 royalty distribution proceedings and the three royalty adjustment proceedings (1980 and 1985 inflation adjustments and the 1982 adjustment for changes in the Commission's distant signal and syndicated exclusivity rules.)[208]

170. The Copyright Act provides that the expenses of administering the compulsory license be deducted from the royalties pool. Deductions are made to cover the operations of the Licensing Division of the U.S. Copyright Office and most of the expenses of the CRT. The entire budget of the Licensing Division is covered by deductions from the cable television and juke box royalty funds. Roughly 76 percent of that total comes from the cable fund. The 1987 cable royalty fund contribution was $703,320. In 1978, it was $215,404.[209]

171. The 1987 cable royalty fund contribution to the CRT was $250,000, compared to $27,919 in 1978. The CRT also gets part of its budget from congressional appropriations. The budget is prepared and appropriations made on a fiscal year basis, while royalties are collected and royalty contributions made on a calendar year basis. The CRT's fiscal 1987 budget is $629,000, of which $125,000 (roughly 20 percent) is appropriated. The other $504,000 comes from cable television and juke box royalty funds for various years. As with the Licensing Division, the allocation between the two is based on relative amounts of staff time spent on maintaining the two funds. Most of the fiscal 1987 contribution of $504,000 comes from the cable fund.

172. These administrative expenses have been rising steadily over time, particularly those of the Copyright Office. They are likely to continue increasing, since they are based on the number of registration forms filed by

cable systems each year and the number of cable systems is increasing. (These forms are filed separately by each cable system, regardless of MSO ownership.) The expenses of the CRT are likely to rise slightly with inflation. However, due to the small size of the agency (currently seven employees) which is controlled by the statute, the budget of the CRT is unlikely to increase (or decrease) significantly. The government administrative costs of the compulsory license thus appear to be approximately one million dollars per year.

173. Some commenters have claimed that delays in the disbursement of royalties reduce program suppliers' certainty regarding projected revenues and that this constitutes an additional cost of the compulsory license system.[210] While we do not have sufficient information to evaluate the assertion of a cost, an examination of the record of CRT distribution proceedings bears out the contention that there have been delays in disbursement.[211] Typically, the CRT makes partial disbursements during the course of the distribution proceeding, holding back only that which it deems necessary to settle any controversies. Nevertheless, in every case but one, a period of one and one-half or more years elapsed between the end of the year for which royalties had been collected and the first partial distribution. In many cases, significant fractions of the funds were not distributed until two and one-half years had elapsed. The exception was 1982, in which 90 percent of the fund was distributed in December of 1983.[212]

174. The CRT's distribution proceedings do not begin until several months after the end of the year for which royalties have been paid. For example, the CRT's initial notice in the 1986 distribution proceeding, to ascertain whether a controversy exists concerning the distribution of funds, was adopted on December 10, 1987, while the declaration that a controversy exists was adopted on April 18, 1988. The 1987 proceeding has not yet begun. The distribution proceedings frequently take a long time to complete,[213] and, as noted above, are frequently appealed. Thus, there is, in fact, a substantial interval between the use of copyrighted works by cable television systems and the receipt by copyright claimants of compensation for it. Uncertainty attaches to both the timing and the amount of this compensation.

175. The available evidence thus suggests that the transactions costs of the compulsory license system are significant.[214] For 1987, the cost of CRT and U.S. Copyright Office participation in administering the compulsory license was over $1,000,000. In addition to this, copyright holders incur costs of participating in CRT distribution and rate adjustment proceedings and costs of litigation stemming from those proceedings. Cable operators incur costs of participating in rate adjustment proceedings and associated litigation. They also bear the burden of preparing Statements of Account twice a year for the U.S. Copyright Office. The transactions costs of the compulsory license may well differ from year to year depending on whether or not copyright claimants come to settlement agreements and whether or not CRT decisions are appealed. It is clear that the possibility for expensive litigation cannot be ruled out. While a full copyright liability regime also has transactions costs, it brings consumers the benefits of improved program production and distribution, in addition to saving the costs of running the compulsory license system. We now turn to a brief discussion of how a transition from the compulsory license to full copyright liability might be managed.

V. The Transition to Full Copyright Liability

176. The existence of the compulsory license means that there are currently very limited incentives for broadcasters to acquire cable retransmission rights to their programming. Moreover, the compulsory license system has been in operation for a substantial period of time. Industry practice, including standard program contract terms, has adjusted to that system. It therefore seems appropriate to move to full copyright liability only after a transition period. During that period, the arrangements and institutions needed to implement full copyright liability could be set up. Time would also be available for renegotiation of program contracts if necessary.

177. We have no basis at this point for proposing a specific length for the transition period. The transition provided in our *Syndicated Exclusivity Report and Order* (one year, extended to almost 18 months on reconsideration)[215] should probably serve as a lower bound on the length of the transition period for elimination of the compulsory license.

178. The Congress may wish to consider using the framework of the recently-enacted "Satellite Home Viewer Act of 1988" to structure the transition.[216] That act extends the compulsory license to include secondary transmissions by satellite carriers of broadcast signals for private home viewing. This compulsory license will terminate on December 31, 1994. For the first four years that it is in effect, the Act prescribes royalty rates of $0.12 per subscriber per station per month for independent stations and $0.03 per subscriber per station per month for network stations. (The license for network stations is limited to unserved households.)

179. For the final two years of the license term, the Act sets up a "voluntary negotiation" mechanism. Under this procedure, "satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees."[217] In the event that some or all carriers are unable to reach voluntary agreements with copyright holders, the Act provides for the royalty rates to be set by compulsory arbitration. This process would be conducted under the supervision of the CRT by independent arbitrators.

180. Two aspects of this structure might be applied to the cable compulsory license. First, Congress might adopt the December 31, 1994 sunset date of the home satellite compulsory license as the date for terminating the cable compulsory license. This would fix the transition period at six or fewer years, depending on when the terms of the compulsory license were altered legislatively. Second, Congress could apply some or all of the royalty determination mechanism in the Act to the cable compulsory license during the transition. Requiring the parties in interest to make an attempt to agree voluntarily on royalty rates could well stimulate the formation of some of the institutions that would be needed in a full copyright liability regime.

181. The application of the home satellite market royalty structure to cable at some point in the transition could also encourage movement in the direction of full

copyright liability and the development of the requisite institutions. In addition to effecting an important simplification in the system, one recommended by the U.S. Copyright Office,[218] this measure would, in a wide range of cases, provide an increase in the rates paid by cable systems for distant signals. Such an increase could constitute an interim step on the path to full copyright liability.

182. The following illustrative rate calculations demonstrate how this procedure would affect royalty payments during such an interim period. They are based on a national average basic cable subscription rate for 1987 of $13.11.[219] Form 1 and Form 2 cable systems face an incremental cost of zero for distant signals. The move to $0.12 per subscriber per month for each distant independent signal and $0.03 per month for each distant network signal would clearly represent an increase.[220]

183. Basic rates paid by Form 3 cable systems are a fixed fraction of gross receipts for each distant signal equivalent. (*See* appendix A *infra* for a definition and a more detailed description of royalty calculations.) For the first distant signal equivalent, the fraction is 0.00893; for the second through fourth, it is 0.00563; and for those in excess of four, it is 0.00265. Cable systems in the top 100 markets are also subject to syndicated exclusivity surcharges for some of their signals.

184. Making use of the $13.11 average monthly basic cable subscription rate, it is possible to calculate the royalty payment for Form 3 systems for various categories of signal. "Permitted" distant signal equivalents are subject to the basic rate and, if the cable system is in the top 100 markets and the signal is not "exempt," these distant signal equivalents are also subject to the syndicated exclusivity fee. For those subject only to the basic rate, the monthly fee per subscriber for the first distant signal equivalent is $0.117. The figure for the second through fourth distant signal equivalents is $0.074, while that for the fifth and succeeding distant signal equivalents is $0.035. In each case, a move to $0.12 would represent an increase. However, it should be noted that few cable systems have five "permitted" distant signals. Those carrying "non-permitted" distant signals are subject to a fee of 3.75 percent of gross receipts for each "non-permitted" distant signal equivalent. At the 1987 average basic cable subscription rate, this fee is $0.49 per distant signal equivalent per subscriber per month.

185. Calculations can also be made for signals subject to the syndicated exclusivity surcharge. In the top 50 markets, the rate for the first distant signal equivalent subject to the syndicated exclusivity fee is $0.196. The analogous figure for the second through fourth distant signal equivalents is $0.123. The comparable figures for systems in the second 50 markets are $0.156 for the first distant signal equivalent and $0.099 for the second through fourth. As noted above, the CRT is likely to revise this fee downward in response to the Commission's reimposition of syndicated exclusivity rules. Hence, even where the current rate is above $0.12, in many cases it is likely to be reduced. In any event, it is certainly possible to prescribe a rate equal to $0.12 *or* the rate implied by the current system, whichever is higher.

186. Another measure that might be considered in a transition period is to prohibit (or otherwise limit) the addition of distant signals to existing and/or new cable systems pursuant to the compulsory license. In this way, deviation from the status quo would have to be accomplished with full copyright liability. These specific suggestions are tentative in nature. They are meant to provide a starting point for deliberations on a transition mechanism.

VI. SUMMARY AND CONCLUSIONS

187. In this inquiry, we sought to compare the compulsory license to alternative mechanisms for authorizing cable systems to retransmit television broadcast signals, with a view to determining whether it or another regime best serves the public interest. Some commenters defended the compulsory license and others opposed it. With extremely limited exceptions, critics of the compulsory license called for full copyright liability, at least for distant signals. Our analysis focused on those two options. We determined that, under full copyright liability, consumers are likely to benefit from improved production and distribution of programming. Incentives for program production would be strengthened and the menu of options available would be broadened. Program distribution would be more efficient in the absence of the artificial advantage that currently accrues to the cable medium. Moreover, our examination established that while there was concern when the compulsory license was adopted that the transactions costs of full liability would be unacceptably high, under current circumstances such transactions costs would not be unduly burdensome. For these reasons, we have concluded that the public interest would be better served by a full copyright regime for cable retransmission of broadcast signals. We therefore recommend that the Congress repeal the compulsory license.

188. The transactions cost argument is the principal one advanced today by the proponents of the compulsory license. They argue that the transactions costs of a full liability regime would be unreasonably burdensome and that those costs would unduly limit the availability of broadcast signals over cable. We found that the growth and development of many cable networks since the Copyright Act was passed strongly suggests that cable systems, or intermediaries for them, are quite capable of acquiring cable retransmission rights to broadcast programming and making that programming available to cable subscribers. Transactions costs would *not* be an unmanageable burden. Moreover, transactions costs under the compulsory license are non-negligible. Additionally, we determined that, with such a wide array of non-broadcast programming available to cable today, broadcasters do not have incentives to attempt to foreclose cable subscribers from access to their programming. Indeed, because of cable's wide penetration today, local broadcasters value cable carriage highly. Such carriage can extend the station's reach and/or improve the quality of viewers' reception.

189. We found that the most likely mechanism for providing broadcast programming to cable systems is "networking." Broadcast stations are likely to evolve into retransmission rights packagers, with cable systems operating in a role analogous to "affiliates." Packages of retransmission rights could encompass the entire programming day of the broadcast stations, or only a part of it. This would depend on the range of programming for which the station acquired retransmission rights. Such rights could be negotiated for and acquired in the same proceedings during which the stations now bargain for broadcast rights to programming. This process could work for nationally, regionally, or locally retransmitted stations.

In some cases, national superstations might actually evolve into full copyright cable program channels. In any event, while the manner of delivery of some programming would doubtless change under full copyright liability, and while certain areas might gain access to new material and others lose access to some, even in the short run, a wide and diverse range of programming would remain available to cable subscribers. Over time, the improvement in information on consumer preferences and the stronger incentives to meet those preferences brought about by the move to full copyright liability seem certain to benefit viewers by stimulating new program production and more efficient program distribution.

190. The marketing of cable retransmission rights to broadcast programming will generate additional information on consumer preferences, as well as additional revenue for copyright holders. This will lead to a range of programming that more closely matches consumer tastes. Moreover, programmer choices among alternative distribution media (cable versus broadcast) will no longer be distorted by what has been, in essence, a subsidy to one medium (cable).[221] These benefits of full copyright liability, plus our conclusion that such a regime can in fact be implemented with reasonable transactions costs, lead us to recommend elimination of the compulsory license.[222]

191. Accordingly, IT IS ORDERED, THAT this proceeding on the compulsory copyright license for cable retransmission is TERMINATED.

192. IT IS FURTHER ORDERED, THAT the Secretary SHALL FORWARD copies of this *Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The Methodology of Royalty Calculations for Form 3 Systems

193. This appendix describes the methodology for calculating royalty payments for Form 3 cable systems.[223] These systems are the only ones for which distant signal carriage information is utilized in the royalty calculation. Form 3 systems are those with semiannual gross receipts greater than $292,000. They constitute 1,820 of the 11,612 entities that qualify as cable systems under Copyright Office rules.[224] For this purpose, "gross receipts" includes "amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters." It does not include revenues derived from premium services. Although it corresponds roughly to basic cable revenues, there has been some controversy about the definition.[225] In any event, if the relevant monthly per subscriber fee were $10, then form 3 systems would be those with 4,867 subscribers or more. If the relevant fee were $15, the cutoff would be 3,244 subscribers.

194. The royalty calculations are based on "distant signal equivalents," or "DSEs." Distant independent stations carried by the system count for 1.00 DSEs each, while distant network stations and distant non-commercial educational stations count for 0.25 DSEs each. The legislative history of the Copyright Act of 1976 indicates an intention to provide additional compensation for distant non-network programming only, and the 0.25 figure reflects a judgment that 25 percent of the programming of network affiliates is non-network. Although not explicitly mentioned in the House Report, it appears that educational stations are treated as "affiliates" of a PBS network.

195. The basic fee is calculated based on the number of "Permitted DSEs" carried by the cable system, *i.e.*, the number of DSEs accounted for by signals that were or could have been carried pursuant to FCC rules as of June 24, 1981. The current rates are as follows (expressed in shares of gross receipts): .00893 for the first permitted DSE or any fraction thereof; .00563 per DSE for each DSE greater than one and less than or equal to 4; and .00265 per DSE for each DSE greater than four. The original rates in the statute had this same declining share of gross receipts structure. The minimum payment of the rate for one DSE, even by systems that in fact did not carry any DSEs, was rationalized as a fee for "the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter."

196. The "3.75 fee" is simply equal to 3.75 percent of gross receipts multiplied by the difference between total DSEs and Permitted DSEs. This higher, flat per-DSE rate applies to signals added in response to the elimination by the FCC of its distant signal limitation rules.

197. The syndicated exclusivity fee is based on the difference between permitted DSEs and exempt DSEs. Exempt DSEs are those accounted for by signals that were carried prior to March 31, 1972 in any community served by the cable system *i.e.*, carried prior to the introduction of syndicated exclusivity rules. Those rules, which were eliminated by the FCC in 1980, applied only in the top 100 television markets. The fee also applies only in those markets. The syndicated exclusivity surcharge for systems in the top 50 television markets, expressed as a fraction of gross receipts, is equal to .00599 if permitted minus exempt DSEs is less than or equal to one. If that figure is greater than one but less than or equal to four, the surcharge is .00599 plus .00377 multiplied by permitted DSEs less exempt DSEs minus one. If the figure is greater than four, the surcharge is calculated as .00599 plus (3 x .00377) plus .00178 times the excess of permitted less exempt DSEs over four. For systems in the second 50 markets, the structure is the same, but the surcharges are .0300, .00189, and .00089, respectively.

198. Generally speaking, permitted DSEs, as used in these calculations, are those attributable to signals that were carried or could have been carried on any portion of a cable system prior to June 25, 1981, pursuant to FCC rules in effect at that time. This includes "grandfathered" stations, *i.e.*, those which a cable system was "authorized to carry or was lawfully carrying prior to March 31, 1972." Such stations may be carried even if they are in excess of the signal complement allowed by the Commission's former distant signal importation quotas (which were embodied in the Commission's rules as of June 24, 1981). Stations carried on or after June 25, 1981 are permitted if they could have been carried under the rules

in effect on June 24, 1981 without violating the distant signal importation quotas, or if they are carried pursuant to an individual waiver granted between April 16, 1976 and June 25, 1981, pursuant to FCC rules and regulations in effect on April 15, 1976. Also permitted are stations of the same type substituted for carried network, noncommercial educational, or regular independent stations for which a distant signal quota would have been imposed. There are a few additional types of permitted signal, but these are the main ones.

199. Distant signal importation quotas in the Commission's former rules applied to systems in major television markets (*i.e.*, the top 100) and to those in smaller television markets. These terms are defined in 47 C.F.R. Sec. 76.5 and 76.51. Systems outside all major and smaller television markets were subject to no quotas. For systems in smaller television markets, the relevant quota was three network affiliates (one from each commercial network), one independent station, and all educational stations for which local educational stations did not object to their importation. Thus, cable systems could import enough distant signals, such that the imported signals *plus* whatever local signals were available added up to three network affiliates and one independent station.

200. Systems in the top 50 television markets had a quota of three network affiliates (one from each commercial network), three independent stations, and educational stations to the importation of which no local educational station objected. Systems could also import up to two additional independent stations. The additional number of stations was two minus the number that the system imported in order to reach the quota of three. For example, a system in an area with two local independent stations would need to import one to reach the quota of three. The additional authority would be for one (two minus one) additional independent station. Furthermore, if there are no local independent stations, one of those imported had to be a UHF station.

201. For systems in the second 50 television markets, the quotas were the same as for the top 50, with one exception. The basic signal quota was three network stations and *two* independents.

APPENDIX B

The Effect of the Compulsory License on Program Development Incentives: A Stylized Example

202. This appendix provides an illustration of the unfavorable impact of the compulsory license on incentives to develop new programming. The simple numerical example presented here is drawn from Besen.[226] Suppose a broadcaster in market A is willing to pay 200 for the right to show a program in market A and a broadcaster in market B is willing to pay 100 for the right to show the same program in market B. The program will be produced and shown in these two markets as long as its production and distribution costs do not exceed 300. Suppose further that the program in question is representative of other programming that is available and that the supply of programs is roughly in line with the demand for programs at prevailing prices and production costs.

203. Now introduce into market B a cable system whose only source of programming is the retransmission of broadcaster A's signal into market B. Broadcaster B's willingness to pay 100 for the program in question was based on the size of the audience he could deliver to his advertisers, but with cable offering the program as well, broadcaster B can expect to lose some viewers, and hence some advertising revenue. In particular, suppose broadcaster B's willingness to pay for the program falls from 100 to 60. Suppose further, however, that the addition of the option to view the program on a distant signal carried by cable enhances the overall value of the program to viewers in market B and that cable would be willing to pay 60 for the program if it had to buy the rights to transmit the program. In other words, suppose some additional audience is created by the presence of cable over and above the audience that is diverted from broadcaster B to the cable system.

204. In a well-functioning market with many programs being shown on retransmitted distant signals, this increase in the value of representative programming from 300 to 320 should provide a signal to producers that programs are more valuable than they used to be and that more and/or better programs should be produced. Such a signal is transmitted clearly under full copyright, but it is much more likely to become garbled when a compulsory license substitutes for full copyright.

205. Consider first the case of full copyright. Assuming for the moment that advertisers in market A attach no value to audience in market B, the program producer's revenue from broadcasters falls because broadcaster B's willingness to pay has fallen from 100 to 60 and there has been no commensurate increase in broadcaster A's willingness to pay (As Besen notes, a snow tire ad on a Chicago-based station will generate few sales when retransmitted on a Miami cable system). With cable subject to full copyright liability, however, and willing to pay 60 for the program, the loss of 40 from broadcasters is more than made up by the gain of 60 from cable. In fact, program producers' expected revenue rises in line with the increase in the value of their programs, and a profit incentive is created to devote more resources to program development.

206. At the opposite extreme, consider what would happen if cable had no copyright liability for programs carried on the distant signals they retransmit. Program producers would lose revenues from broadcasters but would not be able to recoup these losses from cable operators. In our example, the revenue earned from a representative program would fall from 300 to 260. Far from sending the proper signal to producers to produce more and better programs, a market in which there was no cable liability for cable retransmission sends the signal that programs are less valuable than they were before cable began retransmitting distant signals.

207. Of course, markets are highly resourceful and adaptable. Under some circumstances, the full increase in the value of the program in market B might be reflected in the price the program producer can charge broadcaster A, in which case the copyright regime would be largely irrelevant. For this to happen, however, broadcaster A would have to be indifferent between audience in market A and audience in market B, contrary to our initial working assumption. Such a situation may well characterize regional or national superstations who have made the conscious decision to substitute regional or national advertising for local advertising; but there are many "pas-

sive" superstations who have not chosen to abandon local advertising and who place little or no value on audience in distant markets where cable systems carry their signal.

208. Even supposing broadcaster A in our example is a passive superstation, a resourceful program producer might offer broadcaster B an exclusive license to show the program in market B. If broadcaster B is also resourceful, he might offer to allow the cable system to show the program as well (by retransmitting the signal of broadcaster A) in return for a fee of 60. Broadcaster B ought to be willing to pay 120 (60 earned from his own broadcast and 60 collected from cable). Thus, if these transactions were to take place, program producers would receive the proper market information despite the absence of satisfactory copyright arrangements. Of course, none of this would have been possible prior to our recent action to restore syndicated exclusivity.

209. The point of these examples of how the market might work satisfactorily despite unsatisfactory copyright arrangements is not that the copyright regime is irrelevant but that the market can often overcome, at least to some extent, regulatory barriers to good performance. Nevertheless, inappropriate regulations force market participants to choose from among an unnecessarily constrained set of options.

210. The foregoing material strongly suggests that the compulsory license is unlikely to generate the same kinds of price signals as would be generated under full copyright. Consider our simple example once again. The broadcaster in market B and the cable operator in market B would each be willing to pay 60 for a non-exclusive right to show the program, whereas the program is worth 100 to the broadcaster if there is no cable competition. It would be beyond the capabilities of the CRT as currently staffed and funded (or as it could ever reasonably be expected to be staffed or funded) to elicit the information that would allow it to determine that the loss to the broadcaster is 40 from cable duplication, much less to elicit the information that would allow it to determine that the gain to the cable system would be 60. Now ask the CRT to make such a determination for hundreds of programs, hundreds of broadcasters, and hundreds of cable systems. This task is surely no less daunting or expensive than the negotiations required to bring program suppliers and distributors together in the marketplace, and we have seen that it is considerably less likely to reach the best outcome for viewers.

211. In general, then, the compulsory license regime can only approximate a market outcome. Moreover, as the following extension of the example shows, the compulsory license is likely to yield lower revenues to producers than they would receive under full liability. In turn, the reduced revenues reduce the incentives to invest in the development of new programs. Suppose that CRT payments for the program in our example are 35, so that expected revenues to the producer total 295 (200 from broadcaster A, 60 from broadcaster B, and 35 from the CRT). This reduction in revenue from the 300 realized before the introduction of cable will lead the program producer to cut back on his investment in program development, which, in turn, will reduce the value of the program to broadcasters and cable viewers. Broadcaster A will no longer be willing to pay 200; nor will broadcaster B be willing to pay 60. Thus, the program producer's realized revenue will be less than the 295 he might initially expect, leading to a further reduction in program quality.

212. Suppose, when the dust settles, the value of the program to broadcaster A is 190, the value of the program to broadcaster B is 50, and the value of the program to cable viewers is 50. The value of the program to all viewers combined is now 290, whereas it was 300 prior to the introduction of cable, and it would be 320 under full copyright. In other words, the failure of the compulsory license process to provide appropriate revenues and appropriate price signals can actually reduce the value of programming below what it would be without cable. Such a disastrous outcome is not inevitable, of course, but there are no safeguards in the compulsory license system that would prevent its occurring.

213. To recapitulate, cable retransmission of distant signals under the compulsory license reduces broadcasters' ability to attract advertising and therefore reduces their willingness to pay for programs. Nor does the compulsory license provide an efficient mechanism for program suppliers to capture revenues commensurate with any additional audience created through cable retransmission of distant signals. Distributions by the CRT are an inadequate and imperfect substitute for the revenues that would be derived through market transactions. On balance, therefore, we conclude that producers have less incentive to supply programs under the compulsory license than they have under full copyright. As a result, viewers are not getting as many or as high quality programs as they would get under full copyright.

APPENDIX C

Statistics on Disbursements of Cable Royalty Funds

Table 2

Deductions From Cable Royalty Funds for Expenses of the Copyright Office and the CRT

Year	Copyright Office	CRT	Total
1978	$215,403.72	$27,919.21	$243,322.93
1979	273,218.00	46,729.90	319,947.90
1980	323,950.00	88,704.25	412,654.25
1981	355,916.00	155,827.00	511,743.00
1982	374,667.00	168,326.00	542,993.00
1983	508,848.00	382,525.00	891,373.00
1984	565,099.00	214,000.00	779,099.00
1985	556,697.00	229,000.00	785,697.00
1986	552,750.00	360,000.00	912,750.00
1987	703,320.00	250,000.00	953,320.00
Total	$4,429,768.72	$1,923,031.36	$6,352,800.08

Notes: The budget of the Licensing Division of the U.S. Copyright Office is covered by contributions from the cable television and jukebox royalty funds. According to Division staff, roughly 76 percent comes from the cable fund. The allocation is made in proportion to staff time spent on each activity.

The royalties are collected by calendar year, while the agency budgets are in a fiscal year basis. The CRT's fiscal 1987 budget was $629,000 with

$504,000 authorized to come from the royalty contributions and an appropriation of $125,000. (*See 1987 Annual Report of the CRT, supra* table 1, at 11.)

Table 3

Dates of Distribution of
Cable Television Royalty Funds

1978		**1982**	
May 8, 1981	50%	December 1, 1983	90%
July 23, 1982	50%	March 7, 1985	6%
		March 26, 1986	"Final"
1979		**1983**	
July 2, 1982	50%		
January 12, 1984	35.5%	June 27, 1985	50%
March 7, 1985	10.5%	June 26, 1986	30%
December 19, 1985	0.8%	March 19, 1987	20%
March 20, 1986	"Final"		
1984		**1980**	
		June 14, 1986	78%
May 6, 1983	50%	April 23, 1987	22%
August 11, 1983	30%		
March 7, 1985	6%	**1985**[b]	
December 19, 1985	7%		
March 20, 1986	"Final"	July 23, 1987	99%
		September 3, 1987	1%
1981		**1986**	
August 11, 1983	85%		
November 17, 1983	5%	April 21, 1988	53% (c)
April 23, 1984	6.5%		
March 7, 1985	(a)		
December 19, 1985	0.8%		
March 20, 1986	"Final"		

Table 3

Dates of Distribution of
Cable Television Royalty Funds
(continued)

Source: CRT files, Orders, and *1987 Annual Report of the CRT, supra* table 1.

Notes: All percentages are approximate. Some very small distributions (of late-paid contributions, etc.) are not listed here. "Final" means "all remaining funds."

a This distribution was made to bring the total up to 96%, *including* funds paid in subsequent to the earlier distributions.

b Roughly one half of one percent of the total has not yet been distributed.

c Approximate figure, calculated from table 1.

APPENDIX D

List of Commenting Parties

American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc.

Association of Independent Television Stations, Inc.

Capital Cities/ABC, Inc.

Canadian Broadcasting Corporation

CBS, Inc.

Coalition of Small Cable Television System Operators

Cole, Raywid and Braverman

Community Antenna Television Association

Community Broadcasters Association

Henry Geller and Donna Lampert

Joseph S. Gans, Inc.

Lorimar Telepictures Corporation

Major League Baseball

Mid-Coast Cable Television Inc.

Motion Picture Association of America

National Association of Broadcasters

National Association of Video Distributors

National Basketball Association and National Hockey League

National Broadcasting Company, Inc.

National Cable Television Association

National Public Radio

National Rural Telecommunications Cooperative*

National Telecommunications and Information Administration

Public Broadcasting Service, National Association of Public Television Stations and Corporation for Public Broadcasting

Richard S. Leghorn

Tele-Communications, Inc.

Tempo Enterprises, Inc.

Time, Inc.

Turner Broadcasting System, Inc.

United Video, Inc.

U.S. Copyright Office

* reply comments only

FOOTNOTES

[1] 47 U.S.C. 151.

[2] 47 U.S.C. 154(k)(4).

[3] 47 U.S.C. 521. The 1984 amendments were contained in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984).

[4] Some of the history of this relationship is presented in section II *infra*.

[5] We therefore reject the assertions of some commenters that this inquiry is beyond our jurisdiction. *See* Comments of Cole, Raywid, and Braverman at 3 (filed Aug. 6, 1987), Comments of Mid-Coast Television at 2 (filed Aug. 6, 1987), and Comments of Turner Broadcasting System, Inc. at 4-5 (filed Aug. 6, 1987) (*Turner Comments*). For views of commenters affirming our jurisdiction to undertake this inquiry, *see* Comments of the National Association of Broadcasters at 2 (filed Aug. 6, 1987) (*NAB Comments*), Comments of the National Telecommunications and Information Administration at 2 (filed Aug. 5, 1987) (*NTIA Comments*), and Reply Comments of CBS, Inc. at 6 (filed Oct. 5, 1987).

[6] *See* 47 C.F.R. Sec. 658(j); FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation* (1980) (2 vols.).

[7] *See Second Report* in Gen. Docket No. 86-336, 3 FCC Rcd 1202 (1988), especially para. 1. *See also* the Satellite Home Viewer Act of 1988. Pub. L. No. 100-667, 102 Stat. 3949, 3958-59 (1988) (originally H.R. 2848, now S. 1883), wherein Congress instructs the Commission to undertake three additional inquiries on home satellite dish programming issues.

[8] 17 U.S.C. 101, 111(c), 111(d). *See also Copyright Law Revision*, H. Rep. No. 94-1476, 94th Cong., 2d Sess. at 63, 88-91 (1976) (*House Report*).

[9] 17 U.S.C. 111, 801-804. In general, however, the new copyright law relies heavily on market mechanisms to encourage and reward creative activity. *See* 17 U.S.C. 106.

[10] *House Report*, *supra* note 8, at 89.

[11] *See* section III *infra* for a discussion of the relation between compulsory license and market rates. It is suggested there that, while the basic rates under the compulsory license are below market levels, the rates for signals added pursuant to the relaxation of our distant signal limitation rules in 1980 may well be above market levels in many cases.

[12] In principle, where compulsory license rates are above market levels, programmers and cable operators could agree to bypass the compulsory license and negotiate a lower rate. We believe that the incentives to do this are extremely weak. The above market rates are likely to be for those signals that became eligible for importation when the Commission eliminated its distant signal importation limits in 1981. Such signals are referred to as "non-permitted," (*i.e.*, not permitted to be carried under the Commission's prior rules). *See Report and Order* in Dockets 20988 and 21284, 79 FCC 2d 663 (1980), *aff. sub nom. Malrite T. V. of N. Y. v. F.C.C.* 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 45 U.S. 1143 (1982). Those limits were specified in terms of a permitted signal complement for cable systems in various types of market. Hence, the same station may be carried as a "permitted" distant signal (at rates probably below market levels) by many cable systems and carried, or potentially carried, as a "non-permitted" signal by others. Indeed, the separate fee for non-permitted signals does not even apply to certain classes of cable system. With a signal subject to widespread carriage at below-market rates, the net benefit to programmers from negotiating *ad hoc* rates outside of the compulsory license system for some additional cable carriage is probably slight. *See* Appendix A for a detailed explanation of the fee schedule under the compulsory license.

[13] Moreover, full copyright liability would also lead to increased compensation via more efficient sales of advertising time. *See infra* at para. 89.

[14] Our new syndicated exclusivity rules will allow them to confer exclusive distribution rights on local broadcast stations. Producers themselves can enforce syndicated exclusivity rights in areas for which no broadcast rights have been sold. However, producers can only exercise this right for a period of one year from the first broadcast syndication licensing of the program in question anywhere in the United States. *See Report and Order* in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988) (*Syndicated Exclusivity Report and Order) recon. grtd in part and denied in part*, 4 FCC Rcd 2711 (1989), pet. for rev. filed, *United Video, Inc. v. FCC*, Nos. 88-1514, et al. (D.C. Cir. July 20, 1988).

[15] Because most of the country is served by local affiliates of the three major commercial networks, network affiliates are unlikely to seek or to receive national cable retransmission rights to its network programming. There is, however, a role for network superstations to reach home satellite dish households that are unserved by local affiliates. *See infra* at para. 57.

[16] For this reason, our discussion below does not encompass the material presented by proponents of the compulsory license to support their claims that the broadcasting and program production industries are thriving. *See, e.g.*, Comments of the National Cable Television Association, Inc. at 18-27 (filed Aug. 6, 1987) *(NCTA Comments)*, Comments of the Community Antenna Television Association at 5 (filed Aug. 6, 1988), Comments of Time, Inc. at 5-14 (filed July 22, 1987), and Reply Comments of Tele-Communications, Inc. at 8-11 (filed Oct. 5, 1987) *(TCI Reply Comments)*.

[17] Should Congress pass new must carry rules that are sustained by the courts, then we would not recommend eliminating the compulsory license for local signals.

[18] *See Syndicated Exclusivity Report and Order*, *supra* note 14, at paras. 49-89 for a detailed discussion of the public interest benefits of permitting producers and media outlets to negotiate exclusive distribution agreements. The discussion includes in it the case against denying one medium, *e.g.*, broadcasting, the use of this distribution technique while allowing rival media to use it. Our analysis of this issue is confined, of course, to the commercial market for video programming. We take no position on the negotiated license for public television or the other compulsory licenses *(e.g.*, that for jukeboxes) currently embodied in copyright law. *See* 17 U.S.C. 116, 118.

[19] Appendix A provides some additional detail on the methodology of royalty calculations . Appendix B contains an illustrative example of the effects of the compulsory license on program development incentives. Appendix C presents statistics on the disbursements of cable royalty funds, while Appendix D comprises a list of commenters.

[20] *Report and Order* in Docket 12443, 26 FCC 403 (1959).

[21] *Id.* at paras. 65-68, 92.

[22] *Id.* at para. 99.

[23] *Second Report and Order* in Docket 15971, 2 FCC 2d 725 (1966), para. 133.

[24] *Id*, at para. 153.

[25] *Notice of Proposed Rule Making and Notice of Inquiry* in Docket 18397, 15 FCC 2d 417 (1968), para. 35.

[26] *Id.* at paras. 38-43.

[27] *Id.* at para. 37.

[28] *Id.* at paras. 39-40.

[29] *Id.* at para. 39.

[30] *See, e.g., Second Further Notice of Proposed Rule Making* in Docket No. 18397-A, 24 FCC 2d 580 (1970), para. 3; *Cable Television Report and Order*, 36 FCC 2d 143 (1972), paras. 24-26.

[31] *Second Further Notice of Proposed Rule Making* in Docket No. 18397-A, *supra* note 30.

[32] *Id.* at para. 4.

[33] *Id.* at paras. 5, 11.

[34] *See supra* note 30.

[35] *Cable Television Report and Order, supra* note 30, at Appendix E.

[36] *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (local signals). *Teleprompter Corp. v. Columbia Broadcasting System, Inc*, 415 U.S. 394 (1974) (distant signals).

[37] *Teleprompter Corp.*, 415 U.S. at 414.

[38] Besen, Stanley M., Manning, Willard G., Jr., and Mitchell, Bridger M., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, J. Law & Econ., April 1978, at 73-74.

[39] *House Report, supra* note 8, at 89.

[40] 17 U.S.C. 106. Under the 1976 Act, the duration of copyright is generally the life of the author plus 50 years. 17 U.S.C. 302 et seq. Under the Copyright Act of 1909, the duration of copyright was 56 years (a 28 year term that could be renewed once). *House Report, supra* note 8, at 133-34.

[41] *See supra* note 8.

[42] The computation of royalties under the compulsory license is described briefly *infra* at paras. 35-42 and in more detail in Appendix A.

[43] 17 U.S.C. 801 (b)(2)(A). This provision further specifies that in making this type of adjustment, the CRT should consider the rate of "national monetary inflation." As described below, there have been two adjustments. In the first one, the CRT used the as its inflation measure the Consumer Price Index. In the second one, it accepted, with minor modifications, an industry agreement which made no explicit reference to the inflation index used. *See 1980 Adjustment of the Royalty Rate for Cable Systems*, 46 FR 892 (Jan. 5, 1981); *1985 Inflation Adjustment for Cable Copyright Royalty Rates*, 50 FR 18480 (May 1, 1985). *See also Notice Commencing 1985 Cable Royalty Inflation Adjustment Proceeding and Setting Procedural Dates*, 50 FR 10989 (March 19, 1985).

[44] 17 U.S.C. 801(b)(2) (B) and (C).

[45] *See Report and Order* in Dockets 20988 and 21284, *supra* note 12.

[46] *Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry*, 47 FR 52146 (Nov. 19, 1982), aff. *sub nom. National Cable Television Association v. Copyright Royalty Tribunal*, 724 F. 2d 176 (D.C. Cir., 1983). Congress stayed the effective date of the regulations until March 15, 1983. *See Broadcasting*, Jan. 3, 1983, at 31-32.

[47] *See* Appendix A for a more complete discussion of these rates. As in the case of inflation adjustments, parties with a significant interest in these rates are entitled to petition the CRT to reconsider them every five years. The Commission has recently reimposed syndicated exclusivity rules, which are broader in scope than the original ones. *See Syndicated Exclusivity Report and Order, supra* note 14. Presumably, this will prompt the CRT to consider adjusting the syndicated exclusivity fee at some point.

[48] The procedures and criteria specified above for rate changes also apply to adjustments in the gross receipts levels used to divide cable systems into groups for this purpose. *See* 17 U.S.C. 111(d)(2)(C), (D), 801(b)(2)(D).

[49] This has been the case since the first accounting period of 1985, although it was only reflected in U.S. Copyright Office regulations in 1987, according to Licensing Division staff. *See also Compulsory License for Cable Systems*, 52 FR 28252 (July 29, 1987).

[50] *See supra* note 48. *See also* U.S Copyright Office, "Statement of Account for Secondary Transmissions by Cable Systems" (Short Form)--SA1-2.

[51] *See supra* note 48. *See also* U.S. Copyright Office "Statement of Account for Secondary Transmissions by Cable Systems" (Long Form)--SA3.

[52] 17 U.S.C. 111(d)(2)(B). *See* Appendix A for a discussion of how these calculations are made.

[53] 17 U.S.C. 111(d)(1)(A).

[54] *See* 37 C.F.R. Sec. 201.17(b)(1). We note in passing that, while the compulsory license does apply to radio as well as television broadcast stations, we do not consider the issue of radio herein.

[55] *Cablevision Co. v. Motion Picture Association of America*, 641 F. Supp. 1154 (D.D.C. 1986), rev. and remanded 836 F. 2d 599 (D.C. Cir, 1988).

[56] *See, e.g.*, U.S. Copyright Office, "Statement of Account for Secondary Transmissions by Cable Systems" (Short Form)--SA1-2, general instructions, page V, for the accounting period beginning July 1, 1986.

[57] This paragraph describes the statutory directions for distribution proceedings. These directions are found in 17 U.S.C. 111(d)(4), (5) and 804.

[58] The information in the next two paragraphs is drawn from the following CRT decisions: *1978 Cable Royalty Distribution Determination*, 45 FR 63026 (Sept. 23, 1980) (procedures and 1978 claimants and controversies); *1979 Cable Royalty Distribution Determination*, 47 FR 9879 (Mar. 8, 1982) (1979 claimants and controversies); *1980 Cable Royalty Distribution Determination*, 48 FR 9552 (Mar. 7, 1983) and 49 FR 28090 (July 10, 1984) (1980 claimants and controversies); *1981 Cable Royalty Distribution Determination*, 49 FR 7845 (Mar. 2, 1984) (1981 claimants and controversies); *1982 Cable Royalty Distribution Determination*, 49 FR 37653 (Sept. 25, 1984) (1982 claimants and controversies); *1983 Cable Royalty Distribution Proceeding*, 51 FR 12792 (April 15, 1986) (1983 claimants and controversies); *1984 Cable Royalty Distribution Proceeding*, 52 FR 8408 (March 17, 1987) (1984 claimants and controversies); *1985 Cable Royalty Distribution Proceeding*, 53 FR 7132 (Mar. 4, 1988) *(1985 claimants and controversies)*.

[59] *See 1985 Cable Royalty Distribution Proceeding, supra* note 58.

[60] In 1985, MPAA represented copyright holders claiming royalty payments for 5,954 syndicated series, movies, or specials. (Each series is counted as a single program, even if many episodes have been broadcast.) The programs collectively amounted to 575,000 quarter hours of programming. *Testimony of Allen R. Cooper in Behalf of MPAA-Represented Program Suppliers--Phase II at 6, 1985 (Testimony of Allen R. Cooper)*.

[61] The CRT also listed two secondary factors--"(a) quality of copyrighted program material, and (b) time-related considerations." *See 1978 Cable Royalty Distribution Determination, supra* note 58.

[62] *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F. 2d 367, 374 (1982).

[63] *See 1978 Cable Royalty Distribution Determination, supra* note 58.

[64] *See Adjustment of the Royalty Rates for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, supra* note 46. This point is reiterated later in the same document. After arguing that its discretion to determine the new distant signal and syndicated exclusivity fees is not limited by the statutory schedule for the basic fee, the CRT asserts that "the perceived inadequacies of that schedule provide this Tribunal with no justification to balance the scales by excessive compensation of the copyright owners for those copyrighted works within the scope of this proceeding." *Id.* at 52152. At

another point in this decision, the CRT observed that the statutory rates were "adopted by the Congress to implement an agreement between NCTA and MPAA, in which the fee schedule was only one of a number of accommodations reached on cable copyright issues. *Id.* The same opinion has been expressed by the D.C. Circuit. NCTA v. CRT, 724 F. 2d 176, 185 (D.C. Cir., 1983).

[65] *Adjustment of the Royalty Rates for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, supra* note 46.

[66] *Id.* at 52155. In the same document, the CRT also found that there was "no public policy justification for establishing royalty rates below reasonable marketplace expectations of the copyright holders." With respect to the syndicated exclusivity fee, the CRT imposed "an additional fee on the royalty rate already in existence to compensate the copyright owners for losing blackout protection." *Id.* at 52153.

[67] In describing the distant signal fee determination, the court noted that "the Tribunal sought to estimate a market price in the absence of a functioning market." *NCTA v. CRT,* 724 F. 2d 176, 187 (D.C. Cir., 1983). The portion of the decision upholding the syndicated exclusivity fee refers back to the reasoning used to support the distant signal fee. Id. at 188.

[68] *Broadcasting,* Aug. 22, 1988, pp. 32-33, 38.

[69] *Cablevision,* Aug. 15, 1988, p. 65. This compilation does not appear to include pay-per-view services. In addition to the services mentioned in the text, this listing includes 11 text services and nine audio services.

[70] *Comments of the Motion Picture Association of America, Inc.* in Gen. Docket No. 87-24, Appendices C1-C3 and D (filed July 22, 1987). This source also lists 16 text and data services.

[71] *Cablevision,* June 1, 1981, p. 54.

[72] *Comments of the National Cable Television Association* in Gen. Docket No. 87-24 at 56, note 102 (filed July 22, 1987) quoting Cable Data Corporation. Form 3 systems are the larger ones, with semiannual gross receipts of more than $292,00. They are the only ones required to report distant signal carriage as a separate category. *See* paras. 38-40 supr a.

[73] It is possible that many of the new systems started since 1980 chose to carry fewer distant signals than the older systems. To the extent that cable came later to areas with good over-the-air service, this is plausible. Moreover, some systems dropped certain distant signals in response to the Copyright Royalty Tribunal's new distant signal fees, which went into effect in 1983. *See infra* at para. 74.

[74] *See Notice of Inquiry* in Gen. Docket No. 86-336, 51 Fed. Reg. 30,267 (Aug. 25, 1986) at paras. 4-13 for a brief discussion of these developments.

[75] A recent subscriber count shows national satellite-delivered basic services with subscriber counts ranging from one million to 47.8 million. For pay services, the range is 490,000 to 15.9 million. (This excludes an "adult" service, offered primarily to home satellite dish owners, that has 27,000 subscribers). *See Cablevision,* Aug. 15, 1988, p. 65.

[76] *Cablevision,* Mar. 14, 1988, p. 74. The total number of television households in 1976 was 71.1 million.

[77] *Broadcasting,* Feb. 6, 1989, p. 16.

[78] *Television Factbook,* Cable and Services Vol., p. A-41 (1987); p. 73-a (1977).

[79] *Television Factbook,* Cable and Services Vol., p. A-41 (1987). Comparable data for 1976 are not available.

[80] *See Second Report* in Gen. Docket No. 86-336, *supra* note 7, and the sources cited therein for a description of the development of the home satellite dish programming market.

[81] The Satellite Home Viewer Act of 1988, *supra* note 7.

[82] *Id.* at 3950, 3957. These provisions will appear in 17 U.S.C. 119 (a)(2)(B) and (d)(10). For information on satellite delivered broadcast signals, *see Second Report* in Gen. Docket No. 86-336, *supra* note 7, at paras. 68-73 and table 1. Prior to passage of the Satellite Home Viewer Act of 1988, Satellite Broadcast Networks (SBN), one of two carriers providing network signals, was the target of several lawsuits challenging its claim of entitlement to the compulsory license. One of those suits was decided against SBN. *See Broadcasting,* Aug. 22, 1988, p. 88 and Sept. 12, 1988, p. 90. The other provider of network signals, Netlink, had sought permission to retransmit the signals of network stations and, unlike SBN, only offered those signals to unserved households.

[83] *See infra* at paras. 151-152.

[84] *See Home Box Office v. FCC,* 567 F. 2d 9 (1977), *cert. denied,* 434 U.S. 829 (1977).

[85] *Quincy Cable TV, Inc. v. FCC,* 768 F. 2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.,* 106 S. Ct. 2889 (1986).

[86] *Must Carry Report and Order,* 1 FCC Rcd 864 (1986), *recon. denied,* 2 FCC Rcd 3593 (1987), *rev'd sub nom. Century Communications Corp. v. FCC,* 835 F. 2d 292 (D.C. Cir. 1987), *clarified,* 837 F. 2d 517 (D.C. Cir. 1988), *cert. denied,* 108 S. Ct. 2014 (1988).

[87] Cable operators who carry at least one distant signal may carry local signals without paying any royalty fees beyond those required by carriage of the distant signal or signals. Those cable operators who carry only local signals incur a small copyright liability with the first local signal carried. The carriage of additional local signals brings no increase in that payment. *See* the explanation of the royalty system *supra* at paras. 35-42.

[88] This is not to say that all cable systems will spend the same amount on carriage rights negotiations. In choosing the level of negotiations expenditures, cable systems will consider benefits in terms of increased subscriber revenues as well as costs. Thus, larger systems may spend more on rights negotiations, other things equal, than smaller ones. Nevertheless, for a given cable channel, while the royalty fee obviously will be much higher for a system with 100,000 subscribers than one with 1,000 subscribers, the cost of negotiating the deal is likely to be similar in each case.

[89] *See supra* at para. 54.

[90] *Television Factbook,* Cable and Services Vol., p. A-13 (1987). *Broadcasting,* Jan. 16, 1989, p. 18.

[91] This conclusion would not be altered in the event that cable operators negotiated directly with copyright holders for rights to some or all programming. In this case, transactions costs would be gauged by examining the number of programs for which a license is sought and the number of copyright holders with whom negotiations must be conducted. The number of programs per signal (roughly related to how many hours per day the station broadcasts) may have increased slightly, and the universe of program producers has also probably increased slightly, although the latter development does not necessarily mean that each system or station is dealing with a larger number of suppliers than before. Hence, the change in transactions costs over time is again dependent primarily on the increase in the number of local signals carried.

[92] The 1976 figures are from *Television Digest, NCTA Convention* Supplement, April 4-7, 1976 and *Television Factbook,* Cable and Services Vol., p. A-41 (1987). The figure for the top 50 MSOs is for March 1, 1976 and the total cable subscribership

figure is for January 1, 1976. The 1987 figures are from *Television Digest*, Nov. 30, 1987, pp. 2-3. Both the top 50 MSOs and total subscribership figures are for October 15, 1987.

[93] U.S. Department of Commerce. National Telecommunications and Information Administration, *Cable Retransmission of Broadcast Television Programs Following Elimination of the "Must Carry"* Rules, 33 (1985).

[94] *Television Factbook*, Cable and Services Vol., pp. A-36-A-38, A-41 (1987); p. 73-a (1977). The figures for large cable systems are for September 1, 1976 and April 1, 1987, respectively. The total subscribership figures used to calculate the percentages are for January 1, 1976 and January 1, 1987.

[95] In Section IV, *infra*, we discuss some of the different market arrangements that might arise under full copyright. Networking, for example, would economize on transactions costs by allowing program suppliers to sell to broadcast intermediaries, who would then license entire channels to cable systems. Blanket licensing arrangements might emerge for lower valued programs for which transactions costs were large relative to the royalty fees that could be charged, but such arrangements would differ from the compulsory license in that the level of rates would be set as a result of negotiations between buyers and sellers and not by a government agency.

[96] As currently applied to audiovisual works in most modes of distribution other than cable, full copyright liability allows copyright owners to receive market rates for exhibitions of their works. In general, consumers are well served by an unrestricted market when there are many providers of a good or service competing for the patronage of the public markets. Rivalry among a large group of producers (continually augmented by new entrants and depleted by the departure of the unsuccessful) spurs them to create programming desired by viewers, while the variation in compensation for different programs, a key aspect of the market system, transmits valuable information on consumer preferences and provides incentives to cater to those preferences. Competition also holds overall program prices down, although particularly popular material will certainly produce substantial revenues. Similarly, competition among distribution channels--cable television, broadcast television, cassette rental, home satellite dishes (to a limited extent), and, in the future, MMDS and DBS--benefits consumers by encouraging efficient program distribution and ensuring that consumer valuations of programming are transmitted as accurately as possible to program producers.

For analytic discussions of competition and consumer welfare, *see* J. Hirshleifer, *Price Theory and Applications* (2nd. ed.) 520-49; F. M. Scherer, *Industrial Market Structure and Economic Performance* (2d ed.) 9-44. For a discussion of FCC reliance on competition as a policy tool, *see Syndicated Exclusivity Report and Order, supra* note 14, at para. 4 and note 10.

[97] Comments of the Motion Picture Association of America (filed Aug. 6, 1987). Attachment A: "Statement of Stanley M. Besen on the Cable Compulsory Copyright License" (hereinafter *Besen Statement)* at 38-39.

[98] Comments of Capital Cities/ABC, Inc. at 20 (filed Aug. 6, 1987) *(ABC Comments)*.

[99] *See supra* at para. 50. *See also Besen Statement, supra* note 97, at 10, note 22.

[100] According to figures compiled by Cable Data Corporation from cable system Statements of Account on file at the U.S. Copyright Office, there were 2.1 million subscribers in Form 1 systems and 5.1 million subscribers in Form 2 systems, out of a total of 35.8 million cable subscribers in the second six- months of 1985, which is the latest period for which such data are available.

[101] Comments of Major League Baseball at 6, note 8 (filed Aug. 6, 1987) *(MLB Comments)*.

[102] Comments of the Association of Independent Television Stations, Inc. at 6 (filed Aug. 6, 1987) *(INTV Comments)*. It should be noted that the television station probably reaches more households than the cable systems do, which would lead to a higher rate paid by the station. The station derives its revenues from the programming by selling advertising, while the cable systems derives its revenue from subscription fees. The net effect of these factors on the relative prices paid for programming by the independent station and local cable operators is not clear. However, it seems unlikely that they would lead to the extreme divergence cited in the comments.

[103] *Testimony of Allen R. Cooper, supra* note 60.

[104] *See, e.g., Cablevision*, Mar. 28, 1983, p. 14. Twenty-seven Group W systems dropped at least one distant signal "in order to avoid passing on to our customers the substantial costs of carrying those signals." Storer Cable Communications dropped 85 signals in 66 markets, noting that this would save "several million dollars" in royalty payments each year. Also, a 1983 survey by NCTA, which yielded responses from 25 of the top 30 MSOs, suggested that 4 million subscribers served by 253 cable systems would lose one or more distant signals. A total of 396 signals were dropped by at least one system. *See* Shooshan and Jackson, Inc. *The U.S. Copyright Royalty Tribunal: An Unsuccessful Experiment in Cable Copyright Regulation*, at 19 (March 1985).

[105] *See supra* note 16.

[106] *See supra* note 97.

[107] *Id.* at i-ii.

[108] Appendix B contains a stylized example, drawn from the *Besen Statement, supra* not 97, that illustrates the negative effects of the compulsory license on incentives to supply programming.

[109] *See Besen Statement, supra* note 97, at 16-29. Some of the other concerns mentioned in this submission will be obviated when our new syndicated exclusivity rules take effect. *See Syndicated Exclusivity Report and Order, supra* note 14.

[110] *See Syndicated Exclusivity Report and Order, supra* note 14, at paras. 76-89.

[111] *Besen Statement, supra* note 97, at 17.

[112] The gross value of the distant signal is lower; its value to consumers net of revenues paid the cable operator is lower; and its value net of the market price paid to the program supplier is lower.

[113] *Besen Statement, supra* note 97, at 19- 21.

[114] Id. at 21.

[115] *ABC Comments* at 21-22.

[116] The right to insert local ads would be a normal part of the bargaining process in those cases where cable operators deal directly with distant signal broadcasters. Networks formed to economize on transactions costs would very likely offer a combination of national ads and local spots much as current broadcast and cable networks do; although the possibility exists as well to forego advertising and charge subscribers directly as premium channels now do. The point is that the compulsory license dictates a particular set of arrangements, whereas full copyright allows the market to determine the most efficient arrangements.

[117] *NCTA Comments* at 7-8.

[118] *See* FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation*, Background Report on "An Analysis of Television Program Production, Acquisition and Distribution," 545-62 (1980) Vol. II. *See*

also U.S. Department of Commerce, National Telecommunications and Information Administration. *Telecom 2000: Charting the Course for a New Century*, 595 (1988).

[119] Cable industry, as opposed to Congressional, fears of limitations on access to broadcast programming should be understood against the background of the Commission's "siphoning" rules. These rules were in effect until 1977, when the D.C. Court of Appeals vacated them. These rules had placed stringent limits on the ability of cable systems to acquire programming such as sports events and feature films for exhibition on pay channels. *See Home Box Office v. FCC*, 567 F 2d 9 (1977), *cert. denied*, 434 U.S. 829 (1977).

[120] *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 497 (1975).

[121] *Copyright Law Revision: Hearings on S. 1361 Before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary*, 93rd Cong., 1st Sess. 406 (1973).

[122] *Copyright/Cable Television: Hearings on H.R. 1805, 2007, 2108, 3528, 3530, 3560, 3940, 5870, and 5949 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 97th Cong., 1st and 2nd Sess. 703 (9182).

[123] *Id.* at 704.

[124] *Supra* note 72.

[125] *Supra* note 77.

[126] Comments of Cole, Raywid, and Braverman at 5.

[127] *Turner Comments* at 15.

[128] *NCTA Comments* at 13, note 19.

[129] *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F. 2d 125 (1982), *cert. denied*, 103 S. Ct. 1232 (1983).

[130] Major League Baseball, along with professional football, basketball, and hockey, has been granted an exemption from the federal antitrust laws for certain agreements covering telecasting of their games. *See* 15 U.S.C. 1291-95. This exemption may be relevant to agreements limiting the territory within which regional sports networks can be distributed.

[131] Terranova, *Cable's ballgame: from peanuts to crackerjacks*, Television Radio Age, April 18, 1988, p. 52. Of the 20 teams listed in this compilation, two (the Atlanta Braves and the Chicago Cubs) utilize superstations as their means of cable distribution. In the case of another five, the local television station that carries their games that have been licensed for broadcast has been made into a superstation. These five teams also have directly-negotiated cable packages of some of their other games.

[132] *Broadcasting*, Jan. 9, 1989, pp. 43-44.

[133] Reply Comments of Turner Broadcasting, Inc. at 8 (filed Oct. 5, 1987).

[134] *Television Digest*, Mar. 14, 1988, at 6.

[135] Joint Comments of the National Basketball Association and the National Hockey League at 2 (filed Aug. 6, 1987).

[136] *Broadcasting*, May 23, 1988, at 44.

[137] The recently-passed Satellite Home Viewer Act of 1988, *supra* note 7, at 3955, 3949-50, 3957, provides satellite carriers a compulsory license to retransmit television broadcast signals for private home viewing. The license applies both to independent television stations and to network affiliates, but for network stations it is limited to unserved households.

[138] This is not to say that producers might not choose to grant exclusive distribution rights for some programming. The point is that broadcasters who purchase such rights have no incentive to refuse cable retransmission consent, as long as a mechanism is available for securing compensation. Purchasing exclusive rights does not generally lead stations to limit availability of their signal. It reflects a business judgment that it is advantageous to exhibit certain programming without duplication on rival channels.

[139] Competition among program suppliers is what economists call "monopolistic competition," in contrast to pure competition or pure monopoly. Because each program is unique, its supplier enjoys a "monopoly" and has some flexibility in setting its price and terms of distribution. As in pure competition, however, the existence of a larger number of sellers offering unique but similar products tends to keep profits at a competitive rather than at a monopoly level.

[140] *See supra* at paras. 63-64.

[141] *See* Appendix D for a list of commenters.

[142] *NCTA Comments* at 9-13. Comments of the Coalition of Small Cable Televison System Operators at 2-6 (filed Aug. 6, 1987). Comments of National Public Radio at 5-9 (filed Aug. 6, 1987). *Turner Comments* at 10.

[143] *See, e.g.*, Comments of Tempo Enterprises, Inc. at 2-3 (filed Aug. 6, 1987), Comments of Cole, Raywid, and Braverman at 7, *Turner Comments* at 14. A few commenters raise the possibility that cable operators would be foreclosed from access to broadcast programming in the absence of a compulsory license, an issue treated *supra* at paras. 92-105. As noted *supra* at para. 15, we believe that the utility of the compulsory license must be assessed by comparing how the viewing public fares with and without it. The presence of healthy broadcasting and program production industries is not sufficient to establish that consumers are better off with the compulsory license. Thus, information about the financial health of these industries is not directly relevant to our analysis.

[144] *See NCTA Comments* at 8; Comments of the Coalition of Small Cable Television System Operators at 2-3 (this commenter also asserts that the transactions cost burden is particularly heavy for small systems); *Turner Comments* at 10; *TCI Reply Comments* at 12.

[145] *NCTA Comments* at 11, note 15.

[146] *See, e.g.*, Comments of Joseph S. Gans, Inc., at 3-5 (filed Aug. 6, 1987), Comments of Cole, Raywid and Braverman at 5.

[147] *Turner Comments* at 13. Comments of the Coalition of Small Cable Television System Operators at 4. *TCI Reply Comments* at 15-16.

[148] Comments of Richard S. Leghorn at 11-13 (filed Aug. 6, 1987).

[149] Comments of Henry Geller and Donna Lampert at 1, *et seq.*; Appendix A at 10 (filed Aug. 6, 1987). In essence, this would raise the rates to infinity for cable systems in the top 100 markets.

[150] *MLB Comments* at 2-10.

[151] This suggestion, a measure to prevent a fall in rate levels, is now moot, since the decision has now been overturned on appeal. *See supra* at para. 42.

[152] The fourth point is beyond the scope of this report.

[153] Comments of the U.S. Copyright Office at 11-12 (filed June 22, 1987).

[154] Some commenters propose retaining the compulsory license for local signals only, in the event that must carry rules are reinstituted. *See INTV Comments* at 4-10. Comments of CBS, Inc. at 17-18 (filed Aug. 6, 1987). Comments of the Motion Picture Association of America at 18-21 (filed Aug. 6, 1987) (*MPAA Comments*).

[155] *NTIA Comments* at 12-16.

[156] *ABC Comments* at 11. For a similar suggestion, *see Besen Statement*, *supra* note 97 at 31, note 38. He refers to "specialized agents" employed by program suppliers to negotiate with cable systems, and analogizes them to program syndicators.

[157] *MPAA Comments* at 17.

[158] *MPAA Comments* at 17 and Comments of the Motion Picture Association of America, Inc. in Gen. Docket. No. 87-24 at 24-25 (filed July 22, 1987). The latter reference is also cited by ABC in its discussion of the viability of nonbroadcast regional cable services as substitutes for regional superstations. *ABC Comments* at 10.

[159] *NTIA Comments* at 14.

[160] *MPAA Comments* at 16-18.

[161] *ABC Comments* at 7-11.

[162] Reply Comments of the National Cable Television Association, Inc. at 6 (filed Oct. 5, 1987). *See also NCTA Comments* at 11, note 15.

[163] Moreover, as the Commission's recently-enacted *Syndicated Exclusivity Report and Order* suggests, workable mechanisms are available for holders of exclusive program exhibition licenses to notify cable operators in good time of their obligations under the rules. This document also suggests that, should they be needed, mechanisms are likely to become available for providing substitute programming to replace any that must be blacked out. Such mechanisms will probably develop regardless of whether any action is taken to modify the compulsory license. *See Syndicated Exclusivity Report and Order supra* note 14, at paras. 76-88, 97-99, and 106-107.

[164] *NCTA Comments* at 11.

[165] Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc. (filed Aug. 6, 1987) (*ASCAP et al. Comments*).

[166] *Id.* at 12.

[167] *ABC Comments* at 11.

[168] *See Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

[169] 17 U.S.C. 111(d)(5)(A).

[170] Comments of Time, Inc. at 18.

[171] *Turner Comments* at 21.

[172] Reply Comments of the American Society of Composers, Authors, and Publishers, Broadcast Music, Inc., and SESAC, Inc. at 1-4 (filed Oct. 5, 1987).

[173] 17 U.S.C. 118.

[174] 17 U.S.C. 111 (d) (5).

[175] *Besen Statement*, *supra* note 97, at 30-31.

[176] *Id.*

[177] This requires competition among networks, but there are many available on cable. *See supra* at para. 53.

[178] 17 U.S.C. 111(d)(2)(B) and 111(f). The distinction in the statute between distant and local signals is based on the Commission's must-carry rules that were in effect on April 15, 1976.

[179] As noted, *supra* at para. 39, Form 1 and Form 2 cable systems pay royalties based solely on gross receipts, regardless of the number of signals--distant or local--retransmitted. Form 3 systems that transmit no distant signals nevertheless pay a fee "for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter . . . " 17 U.S.C. 111(d)(2)(B)(i).

[180] *See supra* at para. 53.

[181] *Communications Daily*, April 28, 1988, p. 7.

[182] *Broadcasting*, May 23, 1988 at 32.

[183] *Id.*

[184] In our recent syndicated exclusivity proceeding, we modified our territorial exclusivity rules to permit broadcast stations to purchase exclusive, as well as non-exclusive national broadcast rights to programming. By purchasing either type of national broadcast rights to programming, a superstation can ensure that cable systems carrying its signal will not be subject to requests from local broadcasters to black out that programming, pursuant to our syndicated exclusivity rules. *See Syndicated Exclusivity Report and Order*, *supra* note 14, at paras. 163-170.

[185] *Broadcasting*, Feb. 6, 1988, p. 31.

[186] U.S. Department of Commerce, National Telecommunications and Information Administration, Office of Policy Analysis and Development, *Cable Copyright: Alternatives to the Compulsory License* (December 1981). *See especially* pp. 83-136.

[187] *Multichannel News*, Jan. 2, 1989, p. 28.

[188] WTBS has 45.1 million, WGN has 24.7 million, and WPIX has 9.7 million. KTVT, at 3.6 millon, is above the level that WOR had achieved in 1979. *See Cablevision*, Aug. 15, 1988, p. 65.

[189] The Commission considered the issue of program duplication in the syndicated exclusivity proceeding, concluding that, with syndicated exclusivity rules, the market would provide the desired level of duplication/time diversity. *See Syndicated Exclusivity Report and Order*, *supra* note 14, at paras. 49-89. Elimination of the compulsory license would provide the same flexibility via producer exercise of copyright rights rather than syndicated exclusivity rights.

[190] This would require additional negotiations for the exhibition of commercials and to obtain rights to any components of the local programming for which the station did not hold the copyright.

[191] *Cablevision*, May 18, 1987, p. 21.

[192] *See supra* at paras. 38-40.

[193] *House Report*, *supra* note 8, at 90. If this means that when copyright owners license local stations to carry a program, they expect that it will reach all local television households and charge accordingly, then the implication is that a local station planning to sell its "program service" would likely have to undertake little additional negotiation with copyright owners. Program contracts frequently include prohibitions on retransmission, a prohibition that the compulsory license currently overrides in the case of cable. The presence of such prohibitions does not mean, however, that under full copyright liability copyright holders would be unwilling to grant cable retransmission rights.

[194] *See* Cabletelevision Advertising Bureau, *Cable TV Facts* (1988) at 11, citing the Nielsen Television Index Cable TV Status Report. The Nielsen data distinguish between local and distant independent stations. While there is no breakdown of local and distant network affiliates or public stations, it is likely that most such stations are local. The Nielsen shares sum to 106 percent, due to second set viewing; the figure in the text corrects for this. It is calculated by summing the relevant shares and dividing by 1.06.

[195] For example, *Multichannel News* reports that there are 48,637,000 cable households, and that USA, WTBS, and ESPN have 46,400,000, 47,900,000, and 49,900,000 subscribers, respectively. *Multichannel News*, Jan. 2, 1989, p. 28; and Jan. 9, 1989, p. 29. The percentage of cable households reached are 95.4, 98.5, and over 100, respectively. The last figure is presumably a consequence of the inclusion of some subscribers, perhaps

served by SMATV or MMDS, that are not cable households. In any event, it is clear that the penetration of cable households by these services is quite high. The fourth quarter 1988 prime time rating for USA network was 2.1. For ESPN, it was 2.5, and for WTBS, it was 2.6. These were the three highest-rated cable services for this period. *Broadcasting*, Jan. 9, 1989, p. 96. While the figures on penetration and ratings may be explained in part by strong demand for these services by a relatively small fraction of cable viewers, they also suggest that the ratings threshold needed to achieve cable carriage is fairly low.

[196] This is a national average. *See supra* note 77.

[197] We cannot, of course, rule out the possibility that a copyright holder may offer a station only local broadcast rights to a program, preferring to sell cable rights directly to a cable network. In this event, the local station would be faced with the choice of declining to carry that particular program or carrying it and offering a reduced schedule to local cable operators.

[198] *See supra* note 154.

[199] For a description, see Larry Jaffe, Bill Links Must-carry, Compulsory License, Multichannel News, April 4, 1988, p. 10. Congressman Bryant introduced a similar bill in the current session of Congress. *See Broadcasting*, Jan. 30, 1989, p. 14.

[200] *See Broadcasting*, June 20, 1988, p. 44.

[201] Economic theory suggests that, in situations that depart from the optimal in more than one respect, correcting a single defect may reduce rather than increase consumer welfare. In other words, harmful distortions may sometimes cancel each other out in part. This line of analysis is known as the "theory of the second best." See F. M. Scherer. Industrial Market Structure and Economic Performance, supra note 96, at 24-29.

[202] In this section, we do not consider costs copyright holders incur by virtue of the divergence of the compulsory license royalty rates from market rates.

[203] *ABC Comments* at 6, note 9; *ASCAP et al. Comments* at 10; Comments of the Canadian Broadcasting Corporation (CBC) at 3-4 (filed June 22, 1987); *Comments of MLB* at 2-5. Unlike the others, CBC supports the compulsory license. However, CBC complains about the high transactions costs associated with it.

[204] While MLB "historically has not supported compulsory licensing," its comments comprise recommendations on ways that the compulsory license could be improved "if the cable compulsory license is to remain." *MLB Comments* at 1-2. *See supra* at para. 122 for a summary of these suggestions.

[205] *Id.* at 2-3.

[206] *Id.* at 4. The *Cablevision* case, discussed, *supra*, at para. 42, is one recent example.

[207] *MLB Comments* at 2.

[208] *See Annual Report of the Copyright Tribunal* (fiscal years 1980-82 and 1985-87) and Copyright Royalty Tribunal *Sunshine Act Report* (calendar years 1978-79, 1984) for 1978-82 and 1984-87 data. *See 1980 Cable Royalty Distribution Determination, supra* note 58, for 1983 data. Distribution proceedings for a given year are undertaken and completed in later years.

[209] *See* table 2 in Appendix C for information on cable royalty fund contributions to the budgets of the Copyright Office and the CRT.

[210] *NTIA Comments* at 10. *See also ASCAP et al. Comments* at 10.

[211] Table 3 in appendix C provides information on the timing of disbursements from the cable television royalty funds. We mean to advance no criticism whatsoever of the CRT. That agency is following an inherently difficult statutory mandate. To carry it out in a fair and equitable manner requires a significant effort.

[212] It should be noted, however, that royalty funds are held in interest-bearing accounts and that the interest is distributed to copyright claimants along with the cable operator payments. 17 U.S.C. 111(d)(3).

[213] The 1986 distribution proceeding, now in progress, is worth examining to get a sense of the nature of the process. As described in the text, the CRT declared a controversy in this proceeding on April 18, 1988. This declaration, which applies to both Phase I and Phase II of the proceeding, was followed by a partial distribution of royalty funds. It is possible that the copyright claimants will come to a settlement agreement before the CRT's distribution proceeding begins, or while that proceeding is in progress. Should a settlement *not* be reached, Phase I litigation will proceed according to the following schedule. A four-month period from August 5 to December 5 of 1988 has been set aside. The schedule provides for three weeks of hearings on Phase I "direct cases" and one week of hearings on "rebuttal cases." The parties to the proceeding file written direct cases, written rebuttal cases, Proposed Findings of Fact and Conclusions of Law, as well as Reply Proposed Findings of Fact and Conclusions of Law. There are also provisions for two "discovery periods" and opportunities for parties to file "motions for underlying documentation." After a decision is reached, the CRT would move on to the Phase II portion of the proceeding, which would have its own schedule. *See Order* in CRT Docket No. 88-2-86CD, April 21, 1988.

[214] This is true notwithstanding the procedures that copyright claimants have developed over time to reduce the costs of the system.

[215] *Supra* note 14, at paras. 106-107. *See also* 4 FCC Rcd 2711 (1989), at paras. 61-62.

[216] *Supra* note 7.

[217] 17 U.S.C. 119 (c)(2)(B).

[218] Comments of the U.S. Copyright Office at 11-12.

[219] This figure is drawn from a survey by the National Cable Television Association. An independent survey of 25 cable systems by *Multichannel News* found an average of $13.12. *See Second Report* in Gen. Docket No. 86-336, *supra* note 7, at para. 43.

[220] *See supra* at para. 39. Form 1 and Form 2 systems incur their full copyright liability with the first broadcast signal (including local signals) that they carry. Form 1 systems pay a flat rate of $4.67 per month. A small system with, for example, 200 subscribers would thus pay $0.023 per subscriber per month for *all* broadcast signals carried. A Form 2 system of intermediate size (gross receipts of $146,000 per six months, equivalent to 1,856 subscribers at the 1987 average basic rate) pays $0.066 per subscriber per month for *all* broadcast signals carried. The comparable figure for a Form 2 system of maximum size (gross receipts of $292,000 per six months, equivalent to 3,712 subscribers) is $0.098 per subscriber per month for *all* broadcast signals carried.

[221] We recognize that, for some *local* signals, the market price of cable retransmission rights may be zero, or even negative (*i.e.*, in some cases less popular broadcast stations might end up paying for cable carriage, a situation that could also arise today under the compulsory license.)

[222] Pursuant to our discussion *supra* at paras. 163-164, should a set of must carry rules be adopted by Congress, we would recommend that Congress consider the implications of this for the compulsory license for local stations.

[223] It is based on U.S. Copyright Office, "Statement of Account for Secondary Transmissions by Cable Systems" (Long Form)--SA3.

[224] These figures, which pertain to the second half of 1987 accounting period, were supplied by staff of the Licensing Division of the Copyright Office.

[225] *See* the discussion *supra*, at para. 42. Had the definition of gross receipts proposed by Cablevision remained in force, royalty payments (which are figured as percentages of gross receipts) would have been reduced, perhaps substantially. (Some estimates placed the prospective reduction as high as 50 percent.)

[226] *Besen Statement, supra* note 97, at 10 *et seq.*

STATEMENT OF CHAIRMAN DENNIS R. PATRICK ON THE CABLE COMPULSORY LICENSE

The Commission has made reliance upon competitive enterprise and free markets the keystone of its program to promote the public interest and to ensure that consumers' desires for a diverse menu of video programming are well served. The evidence adduced in the course of this thoroughgoing investigation strongly suggests that the compulsory copyright license impedes the efficient functioning of the market and its ability to make consumers sovereign. The compulsory license inhibits the free flow of information about consumers' tastes and programming preferences and weakens the incentives of producers to respond to such information. Moreover, by subsidizing program acquisition by cable systems, the compulsory license introduces a significant bias into the program distribution system, disadvantaging competitive alternatives to cable.

Many in Congress have expressed their concern over the strength of the cable industry. Recently some have even gone so far as to characterize cable as a monopoly. While I believe that our program delivery system is now more effectively competitive than ever, our staff's enquiry in this proceeding indicates that the compulsory license is a significant impediment to full and fair competition, and that its elimination by Congress would advance the public interest.

With respect to local broadcasters, the absence of must carry and the presence of the compulsory license constitutes the worst of all possible worlds. Cable can acquire broadcast programming at bargain rates without permission, but broadcasters have no guarantee of access. Full copyright liability would redress this imbalance, allowing local stations to reap additional rewards for their productive efforts, but leaving them the flexibility to bargain for carriage with cable systems that have no current obligation to retransmit broadcast signals. Nevertheless, the key point about our recommendation today is the elimination of the compulsory license would benefit consumers. It is on this basis that I support it, and on this basis that I hope that the Congress will give it serious consideration.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO CONCURRING IN PART AND DISSENTING IN PART

Re: Report on the Compulsory License for Cable Retransmission of Broadcast Signals (General Docket No. 87-25)

Consistent with my initial statement in this proceeding, I am concurring with that portion of the report recommending that Congress repeal the compulsory license for distant signals. Furthermore, I am dissenting to the recommendation that the compulsory license be repealed for local broadcast signals, or in other words, I recommend maintaining the compulsory license for local broadcast signals. In the best of all possible worlds, I would recommend that Congress first address the issue of must-carry. However, in the event Congress does not reimpose must-carry rules, I would then recommend elimination of the compulsory license for local broadcast signals.

I am concerned that with full copyright liability cable operators will have an additional variable to consider when making their determination whether to carry local signals – the cost associated with retransmitting broadcast signals. It is conceivable that under full copyright liability cable operators may choose not to carry local broadcast signals due to the costs of programming retransmission rights. The report does not analyze the cost of full copyright liability on the individual consumer.

I will agree that absent must-carry rules and with compulsory license, the cable industry is enjoying a free ride at broadcasters' expense, and this cannot continue indefinitely. Rather than recommending that Congress eliminate the compulsory license, I would prefer recommending that Congress first consider reinstituting must-carry rules. The report states that in the event must-carry rules are reimposed compulsory license also would have to be reimposed. If Congress acts on the Commission's recommendation to eliminate compulsory license before addressing the must-carry issue and then decides to reimpose must-carry rules, then Congress may find itself with the task of reimposing both rules.

I also want to go on record disavowing myself from the economic analysis attempting to demonstrate that transactions costs on a per-subscriber basis are less today than in 1976. By distributing transactions costs across cable subscribers you have to take into consideration the increase in the total number of cable subscribers since 1976. Holding cable subscribers constant, transactions costs may have actually increased over the years. The economic analysis of transactions costs may lead one to conclude that such costs associated with the current scheme of distributing copyright royalties may undermine the rationale used by Congress to impose compulsory license in the first place – the transactions costs under full copyright liability would be too burdensome.

I also disassociate myself from what could be interpreted as criticisms lodged against Congress and the Copyright Royalty Tribunal.

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